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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, and STANLEY R. RESOR, as Secretary of the Army,

Appellants,

v.

HOWARD B. LEVY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF APPELLEE

QUESTIONS PRESENTED

In addition to those questions stated by the Government on page 3 of its brief:

1. Whether, regardless of the constitutionality of Articles 133 and 134, appellee was denied his constitutional rights and a fair trial on the Article 90 charge and on the speech charges, Articles 133 and 134.

2. Whether the Constitution requires that military personnel receive the same constitutional rights as civilians.

STATEMENT

Appellee, Dr. Howard B. Levy, then a Captain in the United States Army, was tried and convicted for "conduct unbecoming an officer and a gentleman," Article 133, UCMJ, 10 U.S.C. §933, for violating the "General Article," Article 134, UCMJ, 10 U.S.C. §934, and for "willfully disobey[ing] a lawful command," Article 90, UCMJ, 10 U.S.C. §890.[1] Two of the five charges (the "letter charges") were dismissed at the request of the prosecutor after the court had found Dr. Levy guilty, the law officer instructing the court "not to consider those [letter charges] in any way and then dismiss [them] from your mind in deliberating upon and deciding the sentence in this case." A. 648.

Dr. Levy's sentence by concurrence of "two-thirds of the members present at the time the vote was taken" was general and not severable as to the specific charges against him.[2] The sentence was dismissal from the ser-

[1] Dr. Levy was charged as follows: Charge I, Article 90 (for disobedience of order to train Special Forces personnel); Charge II, Article 134 (for statements to enlisted men about the war in Vietnam designed to promote disloyalty and disaffection among the troops); Additional Charge I, Article 133 (for making intemperate, defamatory, provoking and disloyal statements to divers persons at divers times constituting conduct unbecoming an officer and a gentleman); Additional Charge II, Article 133 (for writing a letter to a sergeant critical of American involvement in Vietnam constituting conduct unbecoming an officer and a gentleman); Additional Charge III, Article 134 (for writing a letter to a sergeant with intent to cause disloyalty). The Article 90 Charge is found at App. 7. Charge II and Additional Charges I through III are set out at App. 7-11. *The following abbreviations are employed herein: for references to the printed Appendix, "App."; for the Jurisdictional Statement Appendix, "J.S.A."; for the more often referred to three-volume xeroxed Appendix, "A"; and for the Record of the Court-Martial, "R. Vol. ———, p. ———."*

[2] The court, during deliberations, sought an additional instruction regarding the elements of proof of the letter charges. A. 640.

(footnote continued on next page)

vice, forfeiture of all pay and allowances and confinement at hard labor for three years. A. 651.

The prosecutor had relied on the letter, which was the sole basis for the two letter charges, by referring to and quoting from it during closing argument.[3] R. Vol. 9, pp. 2554-56.

(footnote continued from preceding page)

Concerning Dr. Levy's intent in writing the letter, no conduct being charged, the Law Officer told them:

> . . . the letter need not have resulted in the intended effect—that is, the actual interference with, impairment and influence on the loyalty, morale, and discipline of the military forces . . . but the statements contained in the letter must have had a natural and reasonable tendency to do so. If the intent . . . is present, the fact that a communication was sent to only one member of the United States Forces does not remove such act from the conduct denounced by the statute.
>
> Now, lesser included . . . is an offense as charged substituting gross negligence for this specific intent . . . *Id.* at A. 641.

The court-martial finding him guilty of "culpable negligence" on the letter charges, returned a guilty verdict on them. *Id.* at A. 645. On the following day the letter charges were dismissed on the ground that the court's finding was "tantamount to findings of not guilty." *Id.* at A. 646.

[3] For example:

> "But why must I fight it for you? The same people who suppress Negroes and poor whites here are doing it all over again, all over the world, and you are helping them. You, Sergeant Hancock. You are no better than a killer. Why? No doubt you know about the terror the whites have inflicted upon the Negroes in our country. Aren't you guilty of the same thing with regard to the Vietnamese? A dead woman is a dead woman in Alabama and in Vietnam. To destroy a child's life in Vietnam equals a destroyed life in Harlem. For what cause?" And a series of epithets. Bull shit. This is a dialogue as the defense suggested? This is a calculated design. Gentlemen of the court, the Government's position in this case is not a position that says that Captain Levy cannot express opposition to the United States war effort, we are discussing. Everyone is entitled to his opinion. This is more than that. That letter goes beyond that. That letter is a calculated designed effort to affect one man he knew about who is in Vietnam. . . . R. Vol. 9, p. 2556.

Four of the five charges, including the letter charges—all Article 133 and 134 charges (sometimes collectively referred to as "the speech charges")—were based on pure speech, no conduct being alleged or proved. The other charge (the Article 90 charge sometimes referred to as "the order charge") was based on Dr. Levy's refusal to obey an order to provide medical training to Special Forces Aidmen who are cross-trained in combat skills.

There was never a question regarding Dr. Levy's training of *medical personnel*. He was a good teacher who willingly trained those in the *medical field*. See A. 437. Nor was there any question about whether he would train everyone, "medical personnel" or not, "combat troops" or not, in "first aid." But Special Forces sought to learn "[m]uch more than simple first aid." R. Vol. 13, p. 294; see *id.* at 294-98, 313-16; A. 569-76.

Special Forces and Special Forces Aidmen[4]

Special Forces were "[s]ort of an elite corps," with a GT score (measure of intelligence) "higher generally for special forces than others." R. Vol. 4, p. 721.

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[4] As the Review of the Staff Judge Advocate put it:

> The approximate objectives of the Special Forces are: (a) To plan and conduct unconventional warfare operations in areas not under friendly control; (b) to organize, equip, train, and direct indigenous forces in the conduct of guerrilla warfare; (c) to train, advise, and assist indigenous forces in the conduct of a [*sic*] counter-insurgency and counterguerrilla operations in support of United States cold war objectives; and (d) to perform such other Special Forces missions as may be inherent in or essential to the primary mission of guerrilla warfare. *The decision to evacuate patients or abandon patients is that of the commanding officer and not of the individual Special Forces aidman. The Special Forces aidman is basically a soldier first and an aidman second.* A.1254. [Emphasis added.] See also A. 504.

Its basic fighting unit, an A-Team, consists of twelve men, each of whom is a cross-trained specialist in at least two and hopefully more guerrilla skills. A. 505. On each A-Team there is an officer in charge, a second officer in charge, and an operations and intelligence sergeant. There are two aidmen,[5] demolitions men, weapons sergeants, and communications men. The twelfth man comes from one of these specialties. R. Vol. 2, p. 64.

In South Vietnam there were 72 A-Teams, approximately ten B-Teams and four C-Teams. A. 509. Each B-Team has under it several A-Teams and each C-Team has under it several B-Teams. B-Teams may have physicians assigned to them; A-Teams do not. R. Vol. 4, pp. 574-75.

The "[s]pecial forces trooper is basically a soldier" said Colonel Roger A. Juel, who was in overall charge

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[5] Special Forces Aidman cross-training includes:

a. ". . . [A]mbush. . . . [H]ow to make different types of bombs, shotguns, etc. To set off, usually in a circle-type defense, to trap people in the center." R. Vol. 2, p. 24.

b. ". . . [H]ow to set a charge, how to ignite a charge, how to set up an ambush, and a few . . . just little old bombs, a few types of bombs and explosives you can make." *Id.* at 10. [Ellipsis in original.]

c. Use of "anti-personnel mines," *id.* at 25, "[d]emolitions," "[e]ngineering, weapons, commo," *id.* at 109, "M-60 machine gun, 50 calibre machine gun, automatic rifle," *id.* at 60.

d. "[T]actics and techniques," *id.* at 68.

e. ". . . [C]ivil projects to try and build churches and things they need. Not bring them to our way of thinking if they didn't want to come, but to help them in their own life." *Id.* at 43.

[R. Vol. 2 contains the two reports of the Article 32 investigating officer. Cites herein are to pages of the transcript contained in the report of February 1, 1967.]

of Special Forces Aidman training, R. Vol. 5, p.930, "and an aid man as a secondary occupation." [6] A. 506.

Their average GT score, higher than "the average for OCS" is comparable to an I.Q. score of 127. A. 501-503. To enter the Aidman program they must:

> have a GT score of 110, which is ten points above the GT score asked for for [*sic*] other Special Forces volunteers. We feel that the higher intelligence of these people adds to their trainability. During the time they're there besides the GT score, we find that because they are volunteers, they have a higher motivation than I've seen in most other troops, indeed in many of the students I've seen in other schools. R. Vol. 8, p. 2466.

They "have been one of the greatest weapons we have had against communist subversion and this is particularly true to Vietnam." A. 508. Theirs is the most important part of special forces work. *Id.*

By the nature of their work they are often on combat patrols. A. 504. Thus a conscientious objector could be

[6] Although during the early stages of the trial Special Forces Aidmen had been presented as medical personnel due to their numerical "MOS" classification as medics, this contention was later dropped. Indeed, during the trial the Army issued the following release:

> The following answers to questions posed by members of the press were supplied by the Information Office, U.S.A., Special Warfare Center, JFK, Fort Bragg.
>
> Q. If Special Forces aid men are captured do you expect them to be treated as medics or combat troops?
>
> A. Combat troops.
>
> Q. Do they carry arms?
>
> A. Most assuredly.
>
> Q. Are their ID cards specially annotated to reflect that they are medics as opposed to combat soldiers?
>
> A. No, they are not so annotated. R. Vol. 18, Exh. 22. See also R. Vol. 7, pp. 2011-17.

a medic but not an Aidman since Aidmen kill. A. 505-06; see also A. 516-17. Indeed, they sometimes use sodium pentothal on prisoners, A. 509-10, for there is no way ". . . to fight guerrilla warfare by the rules." A. 511. Even assassination ". . . is an integral part of guerrilla warfare just as is medical people trying to help the people of an area to win the hearts and minds of the people." A. 511.

They must have medical training for ". . . it's part of their job when you got twelve Americans and five hundred indigenous people, those Americans have to do everything." A. 515.

Aidmen do ". . . very little treatment of the Americans, most superficial of basic treatment. If it was anything requiring serious treatment, he [the American] would be evacuated where he would be treated by doctors. . . . [T]he major portion of his [the Aidman's] . . . practice of medicine, would be the treatment of local civilians. . . ." A. 519.

Special Forces Aidmen are engaged in "a political use of medicine; certainly its effects are political," according to Colonel Richard L. Coppedge, formerly Chief Surgeon for the Special Forces' Warfare Center, who originated the Aidman program. "The motives of those who engage in it may differ." [7] A. 559.

[7] He did not:

> . . . see anything incompatible really in the humanitarian aims of this program and the political aims of the program and the military aims of the program. Some people might object to medicine being prostituted to political purposes, but I don't see it that way. I see us in medicine as using the politicians for our purposes which are purely humanitarian, and why not? At the same time we assume, we in the service assume that we are pursuing the right policy and is the proper one. [*sic*] A. 561.

The Staff Judge Advocate summarizing Colonel Coppedge's testimony said that the Vietnam war "was in many respects a social war in which social instruments such as medicine would have to be utilized." So "we sought to use medicine as a means of approaching the enemy and imposing our will upon his. . . . This is a political use of medicine." [8] A. 1261.

Former Special Forces Sergeant Donald Duncan put it more succinctly:

> . . . [T]he one great "in" that you have is this medic [Special Forces Aidman] because people are short on doctors and trained medical personnel in there; that the thing to do is sort of push a medic up there in front and let him get the confidence of these people by treating them; usually it starts off —sometimes it starts off very slow, but the word gets around. More and more people are coming for this treatment; certain dependency is sometimes involved; then, of course, this lays the way open now for the rest of the team to come in and orga-

[8] The more complete quote follows:

> With the advent of the Vietnam war the mission of the Special Forces changed somewhat; there were more counter-guerrilla forces than there were guerrilla forces. It became recognized than the struggle was more than a matter of weapons, that the struggle was in many respects a social war in which social instruments such as medicine would have to be utilized. So "we sought to use medicine as a means of approaching the enemy and imposing our will on his." This is a peculiarly American approach and is opposed to the Viet Cong approach which is more likely to be terroristic. This is a political use of medicine. Colonel Coppedge believes that in the next fifteen or twenty years we will see people like the Special Forces medic employed by the physician as his assistant in the practice of civilian medicine. When the Special Forces aidman training program was established, there was quite a great deal of opposition. There was an attempt to explain to physicians what Special Forces aidmen were and what they were doing. Colonel Coppedge and Colonel Juel made trips to all the hospitals which were expected to carry out a certain part of the training. A. 1261.

nize them in their primary mission which could be border surveillance; it could be CIDG strike force; it could be regional forces, popular forces.

. . . .

That is part of the medical program in that this is the propaganda value of the medical program.[9] A. 520.

Appellee's Military Training and His Entry into the Service

Dr. Levy entered active duty on July 9, 1965. Subject to the Doctors' Draft he entered the Army under the "Berry Plan."[10] He was assigned to the United

[9] The use of medicine as a weapon has become an openly admitted military policy; a recommended technique to gain the confidence of a guerrilla force is establishment of a medical facility to provide limited treatment to noncombatant people. Field Manual (FM) 31-21, ¶ 52. On July 15, 1967, 3 *U.S. Medicine*, No. 14 (a government publication distributed to Army doctors and medical installations) bore on its cover a picture captioned "Green Beret Medic PFC Donald E. Bradshaw on duty with Army exhibit at AMA meeting in Atlantic City," along with the legend, "MEDICINE AS A WEAPON," giving the title of an article on page 3 as, "In the War to Win Men's Minds Medicine Can Be Considered to be a Weapon." In the words of FM 31-21: "Within the limitations of resources available, operations initiated primarily for their psychological effects may include—(1) Supporting the civilian population by sharing medical services and supplies." *Id.* For examples of Aidmen discussing the political use of medicine see R. Vol. 2, pp. 109-109a; R. Vol. 7, p. 2154. Indeed, medicine is even used as a form of money, a barter item. See R. Vol. 7, p. 2201.

[10] Under the "Berry Plan" physicians were, during the completion of their residencies, technically reservists prior to active duty. Due to the special nature of the statutes under which they were drafted they could not be assigned non-medical duties. See Orloff v. Willoughby, 345 U.S. 83 (1953). In this manner the Army obtained needed medical specialists and medical students obtained temporary draft deferment. But of all students the medical student was the most certain to enter the military. He was deferred temporarily, but his two years' service was not only required (for physicians certain physical requirements were often relaxed) but 50 U.S.C.

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States Army Hospital, Fort Jackson, South Carolina, as Chief of Dermatology. Unlike other medical officers entering active duty, Dr. Levy was not sent to Fort Sam Houston, Texas, for the basic orientation course. Instead, he came to Fort Jackson "directly from civilian life." R. Vol. 8, p. 2413. It was the responsibility of an Operations Sergeant for the Plans and Training division of the hospital to show Dr. Levy upon his arrival "how to put on the uniform" and to brief him on "certain military courtesies and traditions." R. Vol. 8, pp. 2413-14. Later, the Operations Sergeant organized a group of 14 doctors who, like Dr. Levy, had not been provided Fort Sam Houston training, and conducted a "training program." The entire program "lasted for about an hour and a half to two hours each Saturday morning for a six weeks period." R. Vol. 8, p. 2414. Subjects covered during those nine to twelve hours included: the organization of the Army; the organization of the Fort Jackson Army Hospital; the system of military justice; the rights of the accused; psychological warfare; subversion and espionage directed against the Department of the Army; safeguarding defense information; map reading; chemical, biological and radiological warfare; military customs; medical field operations; communications; helicopter evacuation procedures; and safety in commands.

Dr. Levy's total training time was 16 to 26 hours,

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App. §456 (a) (1) specifically extended his draft liability to age 35. Although graduate students and others deferred through age 26 were by almost universal practice relieved of liability at that age, that was not the case with physicians, who were almost universally drafted up to age 35. The Government financed no part of Dr. Levy's medical education and, on July 9, 1965, obtained via the Doctors' Draft a commissioned officer physician who had no basic military training.

id. at 2421, and included "weapons familiarization" and being taken "out on the night infiltration course." *Id.* at 2415. "The mechanical training is about a half hour, sir," the Operations Sergeant testified. R. Vol. 8, p. 2424. This covered the "M 14 rifle and a 45 pistol. The actual firing of the 45 took about an hour, and that included the transportation to and from Andrew Jackson pistol range." *Id.* There Dr. Levy almost "hit the man next to him" and, as his instructor said, "almost me, too. I seen Captain Levy's right about two or three occasions coming back up was wrong." *Id.*

Q. Did he in fact hit someone else's target?

A. He probably did; he didn't hit his. *Id.*

His commander (and accuser at the court-martial) testified that he had been told Dr. Levy "found it difficult to comply with certain customs of the service, such as proper wear of the uniform and trimming of hair and such general things." A. 384.

The Intelligence Investigation

On July 17, 1965, Dr. Levy began participation in an off-duty, out-of-uniform Negro voter registration canvass in nearby Newberry County, South Carolina.[11]

[11] William J. Treanor testified:

> I was in Newberry County . . . and one Saturday afternoon I was down at the courthouse with some people, and Dr. Levy had read about our activities in the newspaper apparently, and he came up just to see what was going on, and I spoke to him then, and I invited him to come up and assist us in any way he felt he could, during his off duty hours. R. Vol. 6, p. 1057.
>
> He came up practically every night and on weekends, and he was very helpful in that he went around from house to house

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On July 19, 1965, someone made the following entry on a sheet of yellow legal-sized paper in Dr. Levy's personnel file: "Determine whetver [*sic*] a loyalty investigation should be made 19 July, 1965." A. 1146.

A civilian Army intelligence investigator (who resided in Prosperity, Newberry County, South Carolina) (the "Special Agent") commenced an investigation of Dr. Levy, the disclosed portion of that investigation (the "G-2 Dossier") containing Dr. Levy's statements that he was ". . . in accord with the democratic form of government as outlined in the Constitution of the United States, even though I disagree with much of the method and policy that the U.S. Government sometimes pursues," A. 761; describing his own "political beliefs as being liberal left," A. 766; and setting forth the following:

> I am not a pacifist; however, I do have certain pacifistic leanings. *I am able to envision situations in which I could conceivably refuse to obey a military order given me by a commander. This would be in such a situation in which I felt that the order was ethically or morally incorrect. I would add that this cannot be a criteria of loyalty inasmuch as in such an unusual situation it might be more loyal not to obey the order. There is ample historical evidence to suggest that this has sometimes turned out to be the case. I don't think that one can honestly predict such a response in advance of the specific situation.* A. 767. [Emphasis added.]

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and explained to people who never had the opportunity to vote before, the importance of their voting in the upcoming city election and, you know, the power of the ballot and the other things that we try to get across to people who have not had any instruction before, you know, just a better democracy. *Id.* at 1057-58.

It appears that the Special Agent began looking into Dr. Levy during the summer of 1965.[12] He said he kept no notes.[13]

The Special Agent was engaged in the following colloquy:

Q. Did you make any investigation of Capt. Levy relating to his activities on affairs around South Carolina?

Col. Severin: Do you mean in the city as opposed to out here at the military?

Q. (By Mr. Morgan) Non-military, yes.

A. I did not myself.

Q. Do you know whether or not someone else did?

A. I cannot answer that. I had better delay answering that until I can see, because this pos-

---

[12] As he put it:

A. I didn't start into this until—well, it would have been the summer of 1965. You see, I was not assigned to this until November of 1965, and then I didn't have—I could only do very limited work after being assigned here until I got a badge and credentials, and it takes some time, and prior to that there was other ment [*sic*] that had worked on the thing. I did not myself.

Q. So in the summer of 1965—

A. Somewhere. I don't know. A. 887-88.

[13] The following transpired:

Q. You don't keep any notes. [He did take handwritten notes, A. 611, 953(a).]

A. No, our notes are destroyed in our office. We have only a field office. My office is in Atlanta and they are destroyed after thirty days after the report goes in after they see them here.

Q. Where did you get that information that is on here, on these notes you are referring to?

A. I got the information from my agent's report. I have burned copies of them now. A. 611-12.

sibly could be a security matter. I do not have that. I do not know that.

Q. Well, now, I am not asking you whether or not someone else did at this point. I am asking you whether or not you know whether or not someone did?

A. Well, I will have to decline to answer that.

Q. As to even whether you have knowledge of whether someone else did?

A. Right.

Mr. Morgan: At this point we request that the witness be instructed to answer the question.

Capt. Shusterman: Sir, I think this relates to certain matters that provide the basis for the classification that we have in the dossier, and apparently there are certain operational techniques and operations by certain other agencies that may be classified . . . A. 855-56.

Over fifth and sixth amendment contentions, the Special Agent was allowed to remain silent.[14] A. 856-57.

The Letter

On September 10, 1965, Dr. Levy wrote an eight-page letter expressing his views on American foreign and domestic policy to a career military intelligence sergeant (8 years in the Army, R. Vol. 6, p. 1061) who was then stationed in South Vietnam. William J. Treanor, a white civilian who was in charge of the Newberry County voter registration campaign, had served in military intelligence with the sergeant, R. Vol. 8, p. 1058,

[14] Indeed, although Special Agent stated the name of his immediate superior, when asked if his superior was an "Army officer" he responded, "Sir, I cannot answer that. I am not at liberty myself to answer that." A. 851.

and, since his discharge, he and the sergeant had been "corresponding fairly regularly." *Id.* at 1059. While staying at Dr. Levy's apartment, Mr. Treanor, responding to the sergeant's last letter, wrote telling him of his voter registration work and commenting on the letter he had previously received. *Id.* The sergeant's letter had told of "the way he felt about the war and the involvement there and what-not." *Id.* at 1060. The sergeant "believed that many people in the United States didn't really understand the situation as well as he thought he understood it." *Id.* at 1064. Treanor "thought it would be to a better understanding between two people I know to be very concerned about world affairs," *id.* at 1065, and testified that Dr. Levy "was invited by me to write the letter and so he sat down and did so." *Id.* at 1059. The letter itself did not disclose that Dr. Levy was an Army officer.[15]

This letter was the sole basis of the letter charges brought under Articles 133 and 134. For a complete discussion of the circumstances of the writing of the letter, see R. Vol. 6, pp. 1056-68.

During the year 1966, Dr. Levy engaged in private and casual conversation with Army personnel, enlisted men *and officers*, expressing disagreement with American foreign policy in general and Vietnam policy in particular. He critically discussed what he believed to be national and South Carolina policy regarding the rights of black citizens. Dr. Levy was accused in Additional Charge I of saying that Special Forces personnel were "liars and thieves," "killers of peasants," and "murderers of women and children." He was also accused of saying that "the United States is wrong in

[15] For the full text of the letter see A. 653-60. See also R. Vol. 6, pp. 1067-68.

being involved in the Viet Nam War," that he would not serve in the war if ordered, and that "colored soldiers" were discriminated against and should not serve in the war. His words were described in Additional Charge I as being "intemperate," "defamatory," "provoking," "disloyal," "contemptuous" and "disrespectful." In Charge II it was charged that he did, "with design to promote disloyalty and disaffection among the troops, publicly utter . . . statements to divers enlisted personnel at divers times" "which statements were disloyal to the United States, and prejudicial to good order and discipline in the armed forces."

The Bringing of the Charges

Colonel Henry Franklin Fancy assumed the hospital command in mid-1966. During his first conversation with his executive officer about Dr. Levy the following transpired.

> . . . Colonel Fancy told me his [Dr. Levy's] file was flagged and, I said, for what? And, he said, "Pinko" and that is all the conversation there was. A. 1029-30.

Of the 600 men under his command only Dr. Levy's file was flagged.[16]

[16] "Flagging" a personnel file results in non-promotion and non-transfer of the officer. This is an administrative action of which the affected officer has no knowledge. Regarding the seriousness of the action see A. 1072-84. But see A. 1012-18, regarding one other officer whose file was "flagged" due to membership in a "subversive" organization. His dossier also was read by Col. Fancy's executive officer. A. 1042. But Colonel Fancy didn't seem to know of him. A. 1079. As the matter was later clarified the other officer was merely under investigation (not "flagged") because he had been to "some meetings" but was not a member of the "civil rights group" ". . . which ha[d] demonstrated against the war in Viet Nam and, which has worked with the Negro in the South and ordered demonstrations and marches in Selma at that time." A. 1123. See also A. 1122-28.

Dr. Levy was "the first confrontation" Colonel Fancy "had ever had with a person . . . who had, in effect, been accused of being or was suspected of being a Communist." A. 798. It was a "rather shocking occurrence." *Id.*

On October 2, 1966, the Special Agent went to the office of Colonel Fancy. Colonel Fancy's G-2 Dossier statement relates:

> I was not informed or aware of any difficulties encountered by Special Forces medical personnel in the Dermatology Section until the week of 2 October 1966. A. 681.

At that first meeting the Special Agent ". . . said that Capt. Levy had attended certain meetings in New York City and that the apparent organization behind these meetings were [*sic*] suspect in some way." A. 796-97. "[H]e said they possibly had some association with Communism. This was the suspicion, of course . . . ," A. 797, and he told Colonel Fancy "that Capt. Levy had been having some dealings with the negro [*sic*] personnel, which . . . were of an unpatriotic nature. . . ." [17] A. 801-802.

The Special Agent did not directly raise the question of Dr. Levy's civil rights and voter registration activities at that time:

Other than the statement that the Special Agent

[17] The Special Agent denied providing Colonel Fancy any information. "I do not give any information I receive," he said. "I do not divulge the sources in talking to him at that time or any time."

He did acknowledge asking ". . . questions and anyone intelligent, such as Colonel Fancy, can deduct from the questions I ask what I am getting at insofar as the questions I am asking. Insofar as telling the Colonel that he is this, he is that, or who said he said this, I do not do that." A. 861.

> made that there was some indication that Capt. Levy was discussing with negros [*sic*] their duty performance in other areas . . . and that Capt. Levy was possibly talking to them on certain rather unpatriotic terms. This is the impression that I recall having when he told me this. A. 800-01.

On October 11, 1966, following these visits from the Special Agent, Colonel Fancy ordered Dr. Levy to provide Special Forces Aidmen ten hours of training in dermatology. Although he trained all other military *medical* and *para-medical* personnel in dermatology, Dr. Levy declined the order on ethical grounds.

Thereafter, Colonel Fancy initiated Article 15, UCMJ, 10 U.S.C. §815 (minor non-judicial punishment[17a]), proceedings against him. In the "middle" of December, 1966 "[t]he G-2 dossier became available" to Colonel Fancy. He "revised" his "estimate of the situation."

> Q. In what way?
>
> A. At that time I was contemplating action under Article 15 because of dereliction in duty. As a result of reviewing the dossier and talking with the Judge Advocate, I felt the charges of a more serious nature were present.
>
> Q. You ordinarily would have dealt with this as a dereliction of duty problem, wouldn't you?
>
> A. Up to that point.
>
> Q. What was it about the dossier that made it

[17a] The maximum being a withholding of privileges, suspension of pay and duty and restriction to limits but in none of these events for more than one-half month.

seem more serious than an Article 15 offense to you?

A. There were certain documents of a confidential nature contained therein which indicated problems of a possibly serious nature with other personnel. A. 808-09. See also A. 1052-53.

Colonel Fancy had previously talked about the matter with Colonel Rawlins, his personnel officer, who had told him

> . . . there were certain records primarily in the hands of the CID or CIC. . . .
> . . . .
> CIC, and I told him I didn't know any of the particulars, but I knew there was certain undertow around the area that he should be looking towards that end of it, too. A. 813.

and Colonel Rawlins' "loyalty" and "security" evaluation of Dr. Levy was also based solely on the Counter-Intelligence Corps' files. *Id.* The complete G-2 Dossier was "unavailable" to Chief Defense Counsel.[18] A. 809-10, 812, 814-19, 829-45.

[18] Demands were made for the entire 180-page Dossier (100 pages of which were never provided) on the grounds of the fifth and sixth amendments, the rights to due process, confrontation, knowledge of the nature and cause of the accusation, and effective counsel. Military counsel assisting in the case was placed ". . . in a position also of a conflict somewhat akin to that of Capt. Levy, in that Army regulations, of course, require him to maintain the secrecy of matters in the dossier, while at the same time his duty as an attorney to his client requires a full disclosure to his client of all matters and facts that come into his possession and knowledge." A. 841. See Exh. C. 50. Fourth amendment grounds were also later invoked, A. 833, as were other constitutional demands arising from the first and ninth amendments. At every opportunity the Government contended that the defense was not entitled to discover its intelligence "techniques." See, *e.g.*, testimony of the Special Agent, A. 856-77.

Colonel Fancy had others read the Dossier. As his executive officer put it, "[h]e just up and suggested that I go read it." A. 1042.

Q. Well, he didn't suggest that just as a part of your regular reading program?

A. I think so.

Q. Was there no given reason that you were to read this?

A. No, sir. *Id.*

To Colonel Fancy, Dr. Levy:

1. Was a "pinko" or "communist." A. 796-99.

2. Then, on February 17, 1967, he was not a Communist—"I was worried about it for a while, but the C.I.C. conducted a thorough investigation and it is my recollection that they determined that he was not a communist." A. 1185.[19]

3. Then at trial the following transpired:

Q. It wasn't until February that you discovered that he wasn't a Communist, was it, February of this year?

A. I have to my knowledge not yet discovered that fact.

Q. I thought you said he got a clearance at your last—I thought when you were testifying?

A. Yes, sir, I know what you mean and I thought I had a clearance, but, I have subsequently been told that I have not had a clearance.

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[19] On February 17, 1967, he was as ". . . certain that insofar as humanly possible he had been cleared as being a member of the communist party." A. 423(h).

Q. Well, that day you knew that he wasn't?

A. Yes, sir.

Q. And today you're not sure again?

A. Today I believe he has not yet been, I know he has not yet been cleared by this National Agency check. A. 398.[20]

Colonel Fancy agreed that he "... obtained all my information on Captain Levy's possible previous political beliefs from reviewing a G-2 dossier and listening to questions from military intelligence agents." A. 423(h).

Following conviction and June 3, 1967, sentencing,[21] Dr. Levy exhausted his military procedures[22] and then

[20] Had Dr. Levy been proceeded against under 10 U.S.C. §3791 which provides for convening a board "... to determine whether [an officer] shall be required, because of moral dereliction, professional dereliction, or *because his retention is not clearly consistent with the interests of national security*, to show cause for his retention on the active list," (emphasis added), he would have been "... allowed full access to, and furnished copies of records relevant to his case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security." 10 U.S.C. §3795(4).

Where records are withheld the officer "... shall, to the extent that the national security permits, be furnished a summary of the records so withheld." 10 U.S.C. §3795. During these proceedings no national security interest was claimed.

[21] On August 2, 1969, Mr. Justice Douglas ordered Dr. Levy released on bail pending habeas corpus. Levy v. Parker, 396 U.S. 1204 (1969). On October 13, 1969, this Court unanimously agreed. Levy v. Parker, 396 U.S. 804 (1969).

[22] United States v. Levy, C.M. 416,463, 39 C.M.R. 672 (ABR 1968), *petition for review denied*, No. 21,641, 18 U.S.C.M.A. 627 (1969). Other proceedings are reported as follows: Levy v. Corcoran, 389 F.2d 929 (D.C. Cir. 1967), *stay and cert. denied*, 387 U.S. 915, 389 U.S. 960 (1967) (sought to enjoin conduct of court-martial); Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); Levy v. Resor, Civ. No. 67-442 (D. S.C. July 5, 1967), *aff'd per curiam*, 384 F.2d 689 (4th Cir. 1967), *cert. denied*, 389 U.S. 1049

(footnote continued on next page)

filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. The petition was denied on June 30, 1971.[23]

He appealed to the United States Court of Appeals for the Third Circuit. On April 18, 1973, the court of appeals reversed the district court, holding Articles 133 and 134 unconstitutional and reversing the Article 90 conviction for prejudicial joinder. Its order said:

> the cause [is] remanded for the purpose of issuing the writ of habeas corpus unless within ninety days of the date hereof the appropriate military authorities shall grant to Howard B. Levy a new trial on the Article 90 charge, in accordance with the opinion of this Court. J.S.A. 96a-97a.

Carmen C. Nasuti, an Assistant United States Attorney for the *Eastern* District of that State, on May 16, 1973, filed a notice of appeal from the court of appeals' decision. The notice was signed by Mr. Nasuti only. It also bore the typed name of the United States Attorney for the Eastern District. No counsel of record, either in the court below or from the Solicitor General's office, was listed on the notice. At no time has either of the persons listed on the notice entered an appearance.

Mr. Nasuti, who signed the notice and the certificate of service, was not a member of the bar of this Court. Supreme Court Rule 33.3(c) requires proof of service by an affidavit, not merely a certificate, when service is made by a non-member of the bar of this Court.

(footnote continued from preceding page)

(1968) (sought bail pending intra-military appellate review); Levy v. Dillon, 286 F.Supp. 593 (D. Kan. 1968), *aff'd*, 415 F.2d 1263 (10th Cir. 1969) (regarding relief while incarcerated at United States Disciplinary Barracks pending intra-military appellate review).

[23] See J.S.A. 98a-103a.

Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the mandate of the court of appeals had duly issued on May 10, 1973. On July 13, 1973, the Government filed a "Motion To Stay That Portion Of The [Court Of Appeals'] Order And Mandate Of April 18, 1973" which required that Dr. Levy be retried (if at all) within ninety days of said order. Appellee received the motion on July 16, 1973. It was transmitted by letter, signed by another Assistant United States Attorney for the Eastern District of Pennsylvania, James H. Manning, Jr. The motion was typed in the name of a counsel of record, William A. Pope, but was not signed by anyone.

Also on July 13, 1973, the Solicitor General applied to this Court for and this Court granted an extension of time to July 30, 1973, to docket the appeal.

On July 17, 1973, appellee filed in the court of appeals an Opposition to the partial stay of mandate, alleging *inter alia* that Rule 41 applies only to stays of mandate pending application for certiorari, not appeal, that the mandate had already issued and its recall had not been requested, and that the appellants had failed to show legal cause for stay or legal justification for application so long after the mandate had issued and so shortly before it was to be complied with.

On July 26, 1973, the court of appeals treated the Government's motion as a request for a recall, and ordered the mandate recalled with the stated condition that an appeal be docketed by July 30, 1973.

The appeal was docketed on July 30, 1973. This Court on October 23, 1973, postponed further consideration of the question of jurisdiction until the hearing on

the merits. The Government filed its brief on January 3, 1974. This case is set for argument in tandem with *Secretary of the Navy v. Avrech*, No. 72-1713 (Oct. Term, 1973).

SUMMARY OF ARGUMENT

This Court does not have jurisdiction because of the Government's failure properly to file notice of appeal. The Government failed to file proper notice of appeal and the time for appeal expired. The time for filing is set by statute, 28 U.S.C. §2101(a), and is not subject to waiver as would have been a failure to comply with the Court's rules. The Government did not properly serve the notice of appeal in violation of Rule 33.3(c) of this Court.

If an appeal may be taken under 28 U.S.C. §1252 from the court of appeals, as the Government argues, then this appeal cannot be treated as a petition for writ of certiorari under 28 U.S.C. §2103 since there was a right to appeal and, consequently, the appeal was not "improvidently" taken. Indeed, it was not taken at all since the Government failed to file a proper notice of appeal. Section 2103 was never intended to excuse formal jurisdictional errors in prosecuting an appeal. It was intended to apply when certiorari rather than appeal was the proper route.

Dr. Levy was prosecuted for speaking. There was no evidence to prove any element of four of the five crimes charged other than his words. No conduct by Dr. Levy was alleged or proved. No listener conduct or act was alleged or proved. *Cf., Garner v. Louisiana*, 368 U.S. 157 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

Truth was rejected as a defense to the pure speech charges in violation of the first amendment and deci-

sions of this Court. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Yates v. United States*, 354 U.S. 298 (1957). The members of the court were left free to set their own standards of whether a "harm" resulted from the words, no legislative, judicial or administrative standards existing. This "no standard" practice has been uniformly condemned. *Gooding v. Wilson*, 405 U.S. 518 (1972). The clear and present danger test, *Schenck v. United States*, 249 U.S. 47 (1919)—*a test applied by military courts, United States v. Priest*, 21 U.S.C.M.A. 564 (1972)—was rejected in Dr. Levy's prosecution. Instead, a culpable negligence standard was employed. In first amendment prosecutions the burden on the regulator to demonstrate the constitutionality of the regulation of speech is especially high, *DeGregory v. New Hampshire*, 383 U.S. 825 (1966); *Abrams v. United States*, 250 U.S. 616 (1919), and here there was not only a complete lack of evidence to meet that burden, but there was no proof of any danger upon which to base a regulation of pure speech.

Regarding the order charge the military administratively created a presumption that all its orders are lawful. Additionally it recognized no defense that the ethics of a physician may conflict with a military order. The shift in the burden of demonstrating the illegality of the order to train Special Forces combat troops in advanced medical techniques violated due process. *Morissette v. United States*, 342 U.S. 246 (1952). Special Forces Aidmen are combat troops—they are not Geneva Convention-protected or Army-recognized medics. On A-Teams they are not accompanied by a physician and are subject to commands of non-medical superiors even as to whether or not to abandon their patients. They

carry weapons, kill, and use sodium pentothal on prisoners. The Aidman program used medicine "as a means of approaching the enemy and imposing our will on him," and as a "political" and "military" weapon. Dr. Levy was bound to impart his knowledge to only those persons subject to the Oath of Hippocrates and to keep the confidences of his patients. He trained physicians and medics, and he trained all combat troops in first aid. But he refused advanced medical training to combat troops and refused to allow them to observe his treatment of patients. This was consistent with his oath and an Army Medical Bulletin and Regulation which decreed that venereal disease information be divulged to medical or health personnel only. It was also consistent with *United States v. Seeger*, 380 U.S. 163 (1965) and *Clay v. United States*, 403 U.S. 698 (1971). When the training was provided by another-physician the patient's right of privacy and confiden tiality was violated. The law officer refused to instruct the court-martial that if it found Special Forces was not a medical or health agency and that its Aidmen through the training program would have learned of the names of venereal disease patients and contacts, then the order was illegal. The prosecution offered no justification or necessity for rejection of Dr. Levy's ethical beliefs or the invasion of his patients' rights, arguing only that the *Manual* does not recognize these defenses. The ethical beliefs of Dr. Levy and his patients' right of privacy demand protection rather than an unexplained refusal to recognize them, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Thomas v. Collins*, 323 U.S. 516 (1945); *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and the prosecution completely failed to justify its refusal. *Sherbert v. Verner*, 374 U.S. 398

(1963); *cf. Whelchel v. McDonald*, 340 U.S. 122 (1950).

The law officer disregarded the military's "some evidence" rule and Field Manual (FM) 27-10 *Law of Land Warfare* (1956) and refused to permit the war crimes defense to the order charge to go to the court. Military law requires only "some evidence" as a condition for submission of a defense to the court. *United States v. Evans*, 17 U.S.C.M.A. 283, 38 C.M.R. 361 (1967). The abundance of proof on war crimes clearly met this test. *Compare Whelchel v. McDonald*, 340 U.S. 122 (1950). The law officer ruled only that he knew "of no court, civilian or military, that is going to sit in judgment on the President's exercise of his power in disposing the troops of the United States." *Cf. In Re Yamashita*, 327 U.S. 1 (1946).

Civil court deference to military judgment regarding violations of military custom is rooted in a British Commonwealth case which was based on the lack of military experience of common law judges and the then unwritten nature of military law. See *Smith v. Whitney*, 116 U.S. 167 (1886). But the extent to which law has been reduced to writing and the wide-spread distribution of printed matter coupled with the exclusive appointment of civilian officials as final arbiters of military matters (*e.g.*, members of the United States Court of Military Appeals *must* be appointed from civilian life, 10 U.S.C. §867(a) (1)) eradicates the basis for continued deference. Since our constitutional system rejects military encroachment and military courts are not well suited to the applicatory nuances of constitutional law, *Reid v. Covert*, 354 U.S. 1 (1957); *O'Callahan v. Parker*, 395 U.S. 258 (1969), civilian deference to the military should cease, the justification therefor no longer existing.

Articles 133 and 134 are vague and overbroad. They were always intended to be vague and serve as a "catch-all." The "higher code termed honor" of military officers is a myth, Winthrop, MILITARY LAW AND PRECEDENTS 710-711 (2nd Ed. 1920), and the words specifying the charges against Dr. Levy ("disloyal," "disgrace" (to himself and the military), "offending justice, law, morality or decorum,") are not only unconstitutionally vague and impermissible but, if clear, were not supported by evidence. If any one such word or phrase is constitutionally deficient, the conviction must be set aside. *Terminiello v. Chicago*, 337 U.S. 1 (1949). The "catch-all" net of the General Articles is too broad, *United States v. Reese*, 92 U.S. 214 (1876), and encourages arbitrary and discriminatory enforcement by delegating to administrative officials the absolute authority to define and thus create offenses. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Executive branch definition of offenses is unconstitutional, *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. McCormick*, 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960). *Cf. United States C. Serv. Comm'n v. National Ass'n of Let. Car.*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). "Disloyalty" is a hard word to define in a kinetic world and Dr. Levy was convicted without an adequate definition of the word being provided even to the court at the conclusion of his trial, *cf. Bouie v. City of Columbia*, 378 U.S. 347 (1964), let alone to him in advance of his remarks. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Stromberg v. California*, 283 U.S. 359 (1931).

The court of appeals was clearly correct in holding the Articles constitutionally deficient in three respects—they deny due process for lack of notice and warning,

encourage an arbitrary and discriminatory enforcement, and infringe on first amendment rights.

The justifications for these vague military statutes—maintenance of high standards of conduct, ease of conviction, punishment of unforeseen crimes—are insufficient to overcome their constitutional defects. The maintenance of high standards contention was rejected in *NAACP v. Button*, 371 U.S. 415 (1963). The court of appeals correctly found the ease of conviction justification "totally bereft of explicit support." The punishment of unforeseen crimes is prohibited by the *ex post facto* clause. The military has no General Articles need that could not be met by explicit due process-standard statutes.

The actual use to which the General Articles are put underscores their lack of necessity. They are employed to increase punishment, to create offenses where there is a lack of substantive proof of crime, and to duplicate other charges. The charges against Dr. Levy well illustrate the abuses to which the General Articles are put. Two charges were based on the writing of one letter. Two charges were based on speaking the same words. The letter charges were conceded to be multiplicitous for punishment purposes—but when they were dismissed the maximum punishment possible was reduced. One charge alleged a violation of a Title 18 offense. Other charges were evidently created by omitting an element of Article 88. These abuses deprived Dr. Levy of due process.

The General Articles were appropriately declared facially void because their overbreadth is more than substantial—it is total. *Cf. Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Dr. Levy's case presents no merely

"marginal" questions of coverage. The General Articles do not clearly cover "a whole range of easily identifiable and constitutionally proscribable" conduct, *United States C. Serv. Comm'n v. National Ass'n of Let. Car.*, 413 U.S. 548, 581 (1973). This case presents speech, not conduct, problems and Dr. Levy asserts his own rights, not the rights of others. Since the General Articles are enforced by administrative officials who are subject to limited Article III court review and the General Articles are not subject to limiting construction in a single prosecution, the most efficient means of protecting the rights of individuals is to consider the Articles on their face rather than in case by case review. *Broadrick v. Oklahoma, supra.* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960).

Dr. Levy's conviction resulted from the selective and unequal enforcement of the law and was error even if the statutes involved are deemed constitutional. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). He was presumed a communist and charged because of his political beliefs and civil rights work. Additionally, Dr. Levy's controversial conversations were constitutionally protected. They were not held with merely the "young and immature," but were primarily held with those who had the "highest" intelligence. The Army erred in applying criminal sanctions to "correct" Dr. Levy's speech. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

The Army did not provide Dr. Levy the military training it provided other officer-physicians. Although the Government contends that Dr. Levy had knowledge of military law and customs—a contention based solely on an Army regulation which states that officers should

be exposed to the *Manual*—the undisputed facts are to the contrary.

Dr. Levy's rights were violated when the prosecution refused to disclose the major portion of the G-2 Dossier—the dossier upon which elevation of the charges to court-martial status was based—to his civilian and chief defense counsel. The dossier was of the lowest security classification, no national security justification was even claimed, and in its entirety it was disclosed to the prosecution and to the appointed assistant military defense counsel who could not reveal its contents to civilian chief counsel or to his client. The parts disclosed were "window dressing." *Molignaro v. Smith*, 408 F.2d 795 (5th Cir. 1969).

The dossier may have included pre-service political information upon which the accuser and the prosecution could not constitutionally rely, *Harmon v. Brucker*, 355 U.S. 579 (1958); or it may have contained the accused's racial or political views which contributed to the decision to upgrade the prosecution to court-martial status, *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *Lenske v. United States*, 383 F.2d 20 (9th Cir. 1967); or illegally obtained matter or its fruit. *Alderman v. United States*, 394 U.S. 165 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963). Any evidence favorable to the accused's defense or constitutional claims should have been disclosed. *Cf. Brady v. Maryland*, 373 U.S. 83 (1963).

The prosecution submitted questionnaires to some 450 of the 17,500 patients who were treated in Dr. Levy's clinic. Thirteen of these were called as witnesses

and the defense was permitted access to only the responses of these thirteen. Dr. Levy, without ability to even identify the balance of the 450 persons, *Levin v. Clark*, 408 F.2d 1209 (D.C. Cir. 1967), sought their questionnaires to prove he did not "publicly" utter statements with design to "divers personnel," that the prosecution could find but thirteen witnesses who had heard any one or more of his remarks. The prosecutor and not a judicial authority was impermissibly allowed to decide what the defense could find useful. *Griffin v. United States*, 183 F.2d 990 (D.C. Cir. 1950). The defense did not rely on the Jencks Act, 18 U.S.C. §3500, but on the duty of the prosecution not to withhold evidence favorable to the accused. *Brady v. Maryland*, *supra*. The district court also denied Dr. Levy's request for discovery of illegally obtained evidence, relying on the good faith representation of one of the Government's counsel that there was none. But a single good faith representation of but one Government lawyer was demonstrably insufficient in light of the number of attorneys involved in the prosecution.

The joinder of separate and inconsistent offenses prejudiced Dr. Levy regardless of whether the charges were constitutional. The statements charged to Dr. Levy must have prejudiced his career 10-man military court. The most prejudical language was charged under multiplicitous offenses. The court of appeals correctly applied the test this Court authorized to determine prejudice. The letter charges were dismissed only after the court had determined guilt. The court's sentence was general and was based on the pure speech as well as the order charge. *Estes v. Texas*, 381 U.S. 532 (1965); *Kotteakos v. United States*, 328 U.S. 750 (1946).

Joinder is inconsistent with federal practice, Rule 8(a), Federal Rules of Criminal Procedure, which the President in promulgating procedure is bound to follow, 10 U.S.C. §836, where, as here, there was no indication that severance would be impracticable.

Dr. Levy was denied his sixth amendment right to fair trial by the exclusion of various identifiable groups from the court-martial panel, resulting in a court of less than impartial finders of facts. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Whitus v. Georgia*, 385 U.S. 545 (1967); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966). Even military trials must comply with the constitutional command of impartiality. *Burns v. Wilson*, 346 U.S. 137 (1953). Command influence permeated this trial. *Reid v. Covert*, 354 U.S. 1 (1957).

The unfairness of the "jury" selection system was enhanced by use of the two-thirds verdict, limitation on peremptory challenges and permitting court members to vote on the challenges for cause.

The Article 32 proceeding was conducted by an officer under command influence, and was closed to the public. *Cf. In Re Oliver*, 333 U.S. 257 (1948). This was a "critical stage" of the prosecution. *White v. Maryland*, 372 U.S. 59 (1963).

The prosecutor had a preferred role in the eyes of the court-martial members (he served as clerk, bailiff, prosecutor, *amicus*, custodian, and special investigator, administered oaths, and even subpoenaed defense witnesses). The Staff Judge Advocate's presence permeates the Record. In this case he illegally served as an investigating officer and thereafter as Staff Judge Advocate.

Dr. Levy was entitled to be tried far from Fort Jackson, if at all. Where the trial was conducted, a defense witness feared reprisals for testifying; another was threatened by a man who mistook him for Dr. Levy; the court was not sequestered; the Public Information Officer distributed a press brochure seeking to discredit a defense witness; and a one-eyed court member received a telephone threat to deprive him of his good eye. The atmosphere compelled a change of venue to provide fairness. *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

Each of these grounds is proper for affirmance of the decision below. *Swarb v. Lennox*, 405 U.S. 191 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THIS CAUSE BECAUSE OF THE GOVERNMENT'S FAILURE TO PERFECT THE APPEAL.

On motion to dismiss or affirm, appellee urged a lack of jurisdiction in this Court because the attorneys who filed and served the notice of appeal were not attorneys of record, and further that the attorney effecting service failed to comply with Rule 33.3 (c) of this Court which requires persons not admitted to the bar of this Court to prove service by affidavit, not by certificate.

Even though appellants sought and obtained a stay of mandate from the court of appeals under Rule 41 which allows stays pending petitions for certiorari, they now insist that 28 U.S.C. §1252 permits an appeal from courts of appeals.[1] If the contention is well taken ap-

[1] Section 1252 reads in relevant part as follows:

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of

(footnote continued on next page)

pellants would be required to comply with the statutes and rules of this Court for perfecting appeals. *Monger v. Shirley*, 131 U.S. Appendix cx, 20 L.Ed. 635 (1872) (appeal cannot be inferred from the state of the record but must be properly brought before the Court); *Castro*

(footnote continued from preceding page)

the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

"Court of the United States" includes courts of appeals. 28 U.S.C. §451. Section 1252 is based on Act of August 24, 1937, ch. 754, §2, 50 Stat. 752 and "court of the United States" was defined by §5 of that Act to include "any circuit court of appeals," now courts of appeals.

Sec. 2. In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law.

Sec. 5. As used in this Act, the term "court of the United States" means . . . any district court of the United States, any circuit court of appeals, and the Supreme Court of the United States. . . .

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v. United States, 70 U.S. (3 Wall.) 46 (1866) (appeal dismissed for failure to prosecute within statutory time limit).

The requirement of filing a timely notice of appeal is jurisdictional, since it is fixed by statute, and is not subject to waiver by this Court. See, *Territo v. United States*, 358 U.S. 279 (1959); *Hartford Accident & Indemnity Co. v. Bunn*, 285 U.S. 169, 177 (1932); Stern and Gressman, SUPREME COURT PRACTICE §7.3, page 333 (4th ed. 1969); Boskey and Gressman, *The 1970 Changes in the Supreme Court's Rules*, 90 S.Ct. 2337, 2346 n. 7.

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The definition in §5 was broad-based and evidently a standard definition inserted by a draftsman (it superfluously permitted, for example, appeals *from* the Supreme Court *to* the Supreme Court). The statute had two purposes—to give the Attorney General a right to intervene in litigation where the constitutionality of an Act of Congress was at issue, 81 CONG. REC. 3254 (1937), and to provide for expeditious decision by this Court. *Id.*, p. 3255, 8507. There does not appear from the records any indication that the appeal should be limited to those from district courts, although this was the concern. At one point the Chairman of the Committee on the Judiciary of the House of Representatives stated:

> . . . Of course, this would not be an attempt to give the right of appeal where the right to appeal does not now exist under the law; at least, that is our view. It gives the right of appeal directly to the Supreme Court in cases where the right to appeal would now be to the Circuit Court of Appeals. *Id.*, p. 3272.

Later debate, however, indicated that the language of §5 did not so limit the right of appeal. *See*, 81 CONG. REC. 3254-73, 8507-15 (1937); H.R. Rep. No. 212, 75th Cong., 1st Sess. (1937); S. Rep. No. 963, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 1490, 75th Cong., 1st Sess. [Conference report] (1937).

But as appellee pointed out in his Motion to Dismiss or Affirm, page 7, note 11, whether or not §1252 actually permits appeal in cases such as this is apparently a matter of first impression. Stern and Gressman, SUPREME COURT PRACTICE (4th ed.) at 31.

If the Government is correct, if 28 U.S.C. §1252 authorizes appeals from courts of appeals, then the Government's appeal may not properly be treated as a petition for writ of certiorari, [redacted] The authority to treat an "improvidently taken" appeal as a certiorari petition was granted by Congress in 28 U.S.C. §2103 and is limited to those cases where certiorari was the proper mode of review. Section 2103 was never intended to authorize the treatment of defective appeals as petitions for certiorari in order to avoid the statutory time limit set in Section 2101 (a). *Cf. United States v. Cotton*, 397 U.S. 45 (1970).

Moreover, this Court dismisses appeals for failure to comply with the time limits its rules set for filing notices of appeal, *e.g., Taggart v. New York*, 392 U.S. 667 (1968), and for docketing appeals, *e.g., Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1966), *rehearing denied*, 385 U.S. 995 (1966). Although no statute or Court rule directly covered the failure to prosecute held fatal in *Castro v. United States*, *supra*, the Court ruled that general statutes regarding invocation of its appellate jurisdiction nonetheless required dismissal.

Even though the Court in an appropriate case may exercise its discretion to excuse failures to comply with its rules, this is not such a case. *See, Pittsburgh Towing*, holding that use of judicial discretion to permit a late appeal was not warranted where there was no explanation of appellants' delay until after appellees had filed their motion to dismiss, and the explanation then given was insufficient. Like the appellants in *Pittsburgh Tow-*

ing, the Government here offered no explanation of its failure to comply with the rules until such failure was pointed out by counsel for the appellee. Moreover, the Government's explanation is even less forgivable than the "misunderstanding between counsel" which was found unsatisfactory in *Pittsburgh Towing*. The Government does not claim misunderstanding. It does not even claim negligence. Instead it claims that it failed to follow the rules for its own "geographical convenience."[2] Whatever the threshold for excusable noncompliance, a Government "geographical convenience" justification does not reach it. As this Court observed in *Pittsburgh Towing*,

> if there are to be rules, there must be some limit to our willingness to overlook their violation. 385 U.S. at 32.

The Government further claims that "[t]his case was handled in the lower courts by the United States Attorney's Office for the Middle District of Pennsylvania." Brief for Appellants, p. 25. The Government's representation is incorrect. In fact, this case has been handled throughout by lawyers from the Department of Justice and Department of Defense in Washington, D. C. Washington attorneys—not Pennsylvania attorneys—wrote the briefs and made every oral argument presented to the district court and the court of appeals. As with the newly-elected State's attorney substituted as a party for his predecessor in *Spomer v. Littleton*, ___ U.S. ___, 94 S.Ct. 685 (1974), the legal connection of the attorneys who filed and served the notice of appeal

[2] Brief for Appellants, at 25. This "reason," of course, does not explain why the attorneys whose assistance was requested did not comply with the simple legal steps necessary to file and serve an effective notice of appeal.

in the instant case is limited to their signatures. Their mere Government job status provided them no legal introduction here and they were and remain legal strangers, their connection with this case being far less than that of Spomer with the *Littleton* case, since Spomer actually took over the functions of the party he replaced. Yet this Court refused to give legal effect to Spomer's actions, instead remanding for determination by the court of appeals whether he was a proper party at all. *Id.* at 690. Similarly, no legal effect should be given the notice actions of Government counsel here, counsel who had no real connection with this case.

The Government has not responded to the argument that since the notice of appeal was filed by counsel not of record[3], it has no legal force or effect. The Government apparently believes this contention to be "frivolous." Brief for Appellants, p. 24. True, modern versions of court rules in many jurisdictions permit filing of notice of appeal by any counsel representing the appellant, *See, e.g., In re Hultin's Estate*, 29 Cal. 2d 825, 178 P. 2d 756 (1947). But where statutes or rules which require filing of notice of appeal by counsel of record have not been relaxed, as is the case here, filing by an attorney not of record is insufficient and the appeal must be dismissed. *Anglo-California Trust Co. v. Oakland Rys.*, 191 Cal. 387, 216 P. 578 (1923). Even if the time for filing a valid notice of appeal has expired, the appellee's motion to dismiss must be granted. *Jackson v. Jackson*, 71 Cal. App. 2d 837, 163 P. 2d 780 (1945).

[3] See, Motion to Dismiss or Affirm, pp. 5-8, and rules set out in the Appendix to the motion. The Government does not contend that notice was filed by any counsel of record or that service was done in compliance with the rules.

See generally, 4A C.J.S. Appeal and Error §591 at 322, *id.* §593 (10) at 347-348.

The Government suggests that since its failure to follow proper procedure did not deprive Dr. Levy of actual notice of the appeal, that failure can be ignored. But that is not the law. The appellees in most cases where defective appeals have been dismissed apparently had actual notice of such appeals. *See, e.g., Monger v. Shirley, supra; Pittsburgh Towing, supra; Hartford Accident & Indemnity Co. v. Bunn, supra; Castro v. United States, supra.*

No counsel in this case has filed a legally sufficient notice of appeal. The time for filing expired thirty days after the court of appeals' judgment on April 18, 1973. 28 U.S.C. §2101 (a). Since the Government's effort to file failed to comply with applicable rules and statutes, and no good cause—indeed, no reason at all beyond appellants' "convenience"—has been shown for noncompliance, this appeal should be dismissed for lack of jurisdiction.

II. THE PROSECUTION FOR PURE SPEECH VIOLATED THE FIRST AMENDMENT. THERE WAS NO EVIDENCE TO PROVE THE OFFENSES.

It is no longer contested by the Government that the Bill of Rights applies to the military and that the first amendment "exacts obedience even during periods of war." *Dennis v. United States*, 341 U.S. 494, 520 (1951) (concurring opinion of Mr. Justice Frankfurter). First amendment incursions require a showing of an "overriding and compelling state interest," *DeGregory v. New Hampshire*, 383 U.S. 825, 829 (1966); a military necessity which must be "most extraordinary," Warren,

The Bill of Rights and the Military, 37 N.Y.U.L. REV. 181, 197 (1962); and "that an immediate check is required to save the country," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Mr. Justice Holmes, dissenting).[1]

> [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Mr. Justice Brandeis, concurring).

Our form of government is built on the premise of free expression. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Marsh v. Alabama*, 326 U.S. 501 (1946). Neither the framers of the Constitution nor this Court have excepted military personnel from this premise. An exhaustive study of the debates by the framers on the application of the Bill of Rights to the military concludes that there is "little reason to suppose that the framers desired Congress to be wholly free of first amendment restraints in legislating for the armed forces." Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 315 (1957). The test where speech and nonspeech are mixed in regulated activity was stated in *United*

[1] So lacking in immediacy—so "unpresent" and "unclear"—was the danger of Dr. Levy's speech that he remained in the dermatology clinic practicing medicine until the day the court-martial began almost six months after the charges were brought.

States v. O'Brien, 391 U.S. 367, 376-77 (1968):

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [Footnotes omitted.]

Where, as here, *only speech* is involved and *no conduct* was alleged or proved, the regulation of that speech must be justified by an "overriding" or "compelling" or "substantial" or "subordinating" or "cogent" or "strong" governmental interest. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 465 (1958) ("whatever interest the State may have . . . has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order"); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (no interest sufficient ". . . to justify the substantial abridgement of associational freedom which such disclosures will effect"); and *Gibson v. Florida*, 372 U.S. 539, 557 (1963) (record failed to demonstrate "the compelling and subordinating governmental interest essential to support" the interference with liberties).

The need for a "showing of 'overriding and compelling state interest'," *DeGregory v. New Hampshire*, 383 U.S. 825, 829 (1966), was not met in Dr. Levy's prosecution. The requisite test of danger was not shown by mere recitation of his allegedly "disloyal" words. Nor did the mere incantation of the words "military necessity" without a showing of that "necessity" suffice. Instead, the Government's interest should have been established either by evidence or by a considered legislative judgment, neither of which was present here.[28]

There is no showing in this Record of either a "clear" or "present" or, for that matter, any other "danger," *Schenck v. United States*, 249 U.S. 47, 52 (1919), and under no conceivable set of circumstances was there any "incitement," *Musser v. Utah*, 333 U.S. 95, 102 (1948).[29]

Wood v. Georgia, 370 U.S. 375 (1962), injected vitality into the *Schenck* and *Abrams* test. In *Wood* the

[28] Compare the Government's administrative addition of the phrase "disloyal statements" with the considered legislative judgment in United States C. Serv. Comm'n v. National Ass'n of Let. Car., 413 U.S. 548 (1973).

[29] Only after an exhaustive examination of the facts and circumstances has this Court ruled against claimed first amendment rights. Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961); Dennis v. United States, 341 U.S. 494 (1951). The defense in a speech case is entitled to prove the absence of the clear and present danger. *Cf.*, Whitney v. California, 274 U.S. 357, 379 (1927) (Mr. Justice Brandeis concurring) (legislative finding of danger not contested); Communist Party v. Subversive Activities Control Board, *supra*, 367 U.S. at 11 (where factual determination is made). Here Congress "defined" the evil—prejudice to order and discipline and conduct unbecoming an officer and a gentleman. "Disloyalty" as an evil to be regulated since it might create the danger has been found by no one (save the apparently anonymous conclusions of an administrative intelligence official) and there was no evidence to find that Dr. Levy's speech fell within the ambit of any such term however defined.

Court searched the record for evidence of a clear and present danger but found only that type of " 'danger' . . . envisioned by the Founders in presenting the First Amendment for ratification." 370 U.S. at 388. *Wood* proved once again that the clear and present danger test is " 'a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.' " *Id.* at 384.

In the total absence of evidence the Government interest served by Dr. Levy's prosecution may be speculated upon. Perhaps the Army really did believe that Dr. Levy's remarks in the Dermatology Clinic in Columbia, South Carolina, would impair its battlefield efficiency or morale or otherwise adversely affect the course of the war in Vietnam or demoralize South Carolina's civilian population. Perhaps there were other speculative flights upon which the prosecution was based. But there was absolutely no evidence to show that this occurred nor was there any evidence as to how this might have occurred. And, speculation as to the Government's interest will not suffice to excuse the Government's failure to prove its interest in prosecuting pure speech. Indeed, the most likely speculation is that the Army's interest in Dr. Levy's prosecution was to silence dissent, an impermissible interest at best.

III. THE CONVICTION VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT SINCE THERE WAS NO EVIDENCE TO PROVE THE NECESSARY ELEMENTS OF THE PURE SPEECH CHARGES.

In *Garner v. Louisiana*, 368 U.S. 157, 163 (1961), this Court held that a state court conviction must be set

aside under the due process clause if it is "totally devoid of evidentiary support. . . ." *Accord, Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Fields v. City of Fairfield*, 375 U.S. 248 (1963) (per curiam); *Gregory v. City of Chicago*, 394 U.S. 111 (1969). *Garner, Thompson, Fields* and *Gregory* say simply that if there is no evidence to prove one or more of the essential elements of a charge, the conviction cannot stand. "In addition," as the Court stated in *Garner*, the concern is not

> whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction. 368 U.S. at 164. [Footnote omitted.]

A. Charge II (Under Article 134)

Here the law officer charged the court that requirements for guilt were:

1) that the statements alleged were made to "divers enlisted personnel at divers times";

2) that the statements were publicly made;[30]

3) that these statements were made with the design to promote disloyalty and disaffection among the troops;

4) that these statements were disloyal to the United States;

5) that these statements had a clear and reasonable tendency to promote disloyalty and disaffection among the troops;

6) that under the circumstances the conduct of the

[30] The "publicly made" element of the crime was deleted by the law officer on the same page of the Record. A. 628.

> accused was to the prejudice of good order and discipline in the armed forces. A. 627-28.

The court was instructed that if it found the accused did not utter any one or more of the specified sets of words it could base a conviction on the other phrases it did find he uttered, A. 630, excepting any unmade statements from its findings. The court findings excepted no statements.

Army Regulation 600-20, ¶42 protects the right of military personnel "to express their opinions privately and informally on all political subjects and candidates, and to become candidates for public office." The law officer in his charge defined "publicly utter" as "to make, to state, to publish, to put forth, or to put in circulation openly, generally, or notoriously as distinguished from doing so privately or in secret."[31] A. 630. The Government contended:

> The facts support the conclusion that the accused uttered the statements in question *with the specific intent that the message take hold*. . . . Government Brief Contra Motion to Dismiss Charge II, R. Vol. 10, Appellate Exhibit 3, last page thereof.

The law officer defined "disloyalty" and "disaffection" as follows:

> "disloyalty" imports not being true to or being unfaithful to an authority to whom respect, obedience, or allegiance is due and tending toward insubordination, refusal of orders, or mutiny. A. 630;

[31] If Dr. Levy had conversed "secretly," he no doubt would have faced other perhaps more serious charges. If he had made his statements more formally, in the public arena off-post and out of uniform, he no doubt would have been prosecuted under United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

> "disaffection" imports disgust and discontentment, ill will, disloyalty, and hostility, toward an authority to whom respect, obedience, and allegiance is due. *Id.*

He charged that prejudice had to be "reasonably direct and palpable," A. 627; that the word "design" "means a specific intent," A. 628; and intent could be inferred from "the natural and probable consequences of any act purposely done." A. 637.

The Government by not mentioning the "public" requirement for proof of the offense, Brief for Appellants, at 39, n. 15, seems to concede that Dr. Levy was not convicted for making "public" statements. But earlier the Government flatly states that the "utterances were 'Publicly' made." *Id.* at 37. Regardless of the Government's current position on the elements of the "crime," *the law officer deleted this element from his charge even though the Manual upon which the Government relies for its proof of notice of military "customs and traditions" and under which Dr. Levy was tried, included it,* MCM ¶213*d*(5) (1951) (*Cf.* MCM, ¶213*f*(5) (1969), which deleted this term) and it was included in the specification charged. App. 7.

Additionally, there was no evidence that there were any "public" statements as "public" is used in Army Regulation 600-20, ¶42, quoted *supra*. Dr. Levy spoke to persons, conversationally, in his office; the Government previously conceded that he "did not make soap box speeches or print his views and comments in the newspapers," but, even though the letter which was the basis of the letter charges was mailed to but one person and Dr. Levy's comments were made in his dermatology clinic office *with the door sometimes open*, it con-

tended that "the circumstances under which he uttered these statements were public as contrasted to private." A. 1335.

Throughout this case the Government and the military have contended that there is no "significant risk that the Article will be used to punish officers for the private expression of ideas." Brief for Appellants at 47. The difficulty with the Government position is that it has not defined "private" *in this Court* let alone in the military law system. Indeed, if the Record here does not disclose "private" *conversations* then only a whisper, softly spoken, offers military personnel an appropriate tone of speech, an enclosed telephone booth a proper setting.

The words "directly and palpably" as used by the law officer were surplusage and added nothing to the definition of the offense. And here the prosecution proved no actual prejudice to good order and discipline.

The "design" requirement similarly adds nothing.[32]

[32] The "intent" aspect illustrates the law officer's and prosecutor's total misapprehension of the very basis of criminal responsibility. Since intent had to be proved, a standard for weighing evidence was sought. Absent incompetency or duress, one's words are usually spoken "willfully." But

> LAW OFFICER: Well, I think the Government's position is that you pour into those words a culpable or gross disregard for the consequences of their utterance. In other words, the tendency to promote disloyalty.
>
> . . . .
>
> LAW OFFICER: You see the culpable thing here . . . is a mental operation in the accused's mind. You can never depart from that, because the words themselves objectively have—are just words. A. 472(a)-73.

The charge to the court included lesser offenses based on various manslaughter-negligence type standards. And the two letter charges were dismissed because the court found Dr. Levy guilty "with culpable negligence" instead of "with intent." A. 645.

See, *e.g.*, *United States v. Harvey*, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970). As Judge Robinson said in *Stolte v. Laird*, 353 F. Supp. 1392, 1405 (D. D.C. 1972):

> Most statements are intended to promote some thoughts on the part of the listener, and such design or intent is implicit in most forms of human communication. If the communication itself is deemed to be disloyal, it easily follows that it was intended to promote disloyal thoughts among the listeners. Thus, the finding of the requisite intent can be, and has been [citation omitted] established simply by virtue of the fact that the statement found to be disloyal was communicated to other military personnel. The intent element of the specification is thus deprived of any independent vitality and made to turn upon the finding of whether the initial statement was disloyal.

The Government contends that the exigencies of military life require the abandonment of the clear and present danger test of *Schenck v. United States*, 249 U.S. 47, 52 (1919). In Brief for Appellants at 33, it refers to its quote from *United States v. Priest*, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338 (1972), printed in its Brief in *Avrech*, at 20. The Government states that this quotation means "essentially speech must be limited which has a clear *tendency* to 'undermine the effectiveness of response to command.' " Brief for Appellants at 33-34. [Emphasis added.] But on the full page from which the Government quotes, 21 U.S.C.M.A. at 570, we find:

> The proper standard for the governance of free speech in military law is still found, we believe, in Mr. Justice Holmes' historic assertion in *Schenck v. United States*, 249 U.S. 47, 52 (1919), that:
>
> > . . . The question in every case is whether the words used are used in such circumstances and are

> of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

The Government if relying on *Priest* should concede that the military at least provides lip-service to the *Schenck* standard. Since it failed to apply that standard to Dr. Levy, the Government cannot consistently argue that his conviction was properly had under even military law.

The Government, arguing for a "clear and reasonable tendency" test, states that this is a "standard instruction." Brief for Appellants at 39, n. 15. Since it also argues that speech trials under Article 134 are limited since "of more than 70 different offenses which Article 134 [now] covers; only five of those involve speech or writing," *Avrech*, Brief for Appellant at 23 [footnote omitted], cases such as this must be novel. Thus, the alleged standardness of the instruction appears doubtful, and of course, the Government's principal authority, *United States v. Priest*, 21 U.S.C.M.A. 564, 570 (1972), indicates the opposite is true.

The law officer's charge to the court, particularly the definitions of "disloyalty" and "disaffection," leaves no doubt that the court and the law officer had no standard by which to judge Dr. Levy's words. They employed a license to create their own standard for guilt. This has been uniformly condemned. *Gooding v. Wilson*, 405 U.S. 518, 528 (1972); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-04 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Herndon v. Lowry*, 301 U.S. 242, 263 (1937).

Here, under the law officer's charge, once Dr. Levy was found to have "uttered" a comment to a member of the armed forces he was subject to conviction if the uttered words were "disloyal" or "disaffectionate." Each element of the "offense" shrieks of vagueness and redundancy. After hearing the evidence and the law officer's charge, neither Dr. Levy nor those who judged him could have discerned the elements of the crime he allegedly committed; after conviction they could be certain that he had been found guilty of "uttering" words.

B. Additional Charge I (Under Article 133)

Here Dr. Levy was not accused of speaking "to the prejudice of good order and discipline" of the Army, but of speaking words unbecoming officers and gentlemen and thereby bringing "dishonor and disrepute" upon himself and, thereby, the Army. The words were the same, the charges different. Here he also was convicted without evidence under Article 133.[33] Here there was no evidence "to bring dishonor or disrepute" to Dr. Levy as an individual and an officer, or to "the military profession which he represents," the military law elements conviction required. A. 631. The Army specified that Dr. Levy's words were:

(1) Intemperate, defamatory, provoking and disloyal . . .;

(2) Intemperate and disloyal . . .;

(3) Intemperate, contemptuous and disrespectful . . .;

(4) Intemperate, defamatory, provoking and disloyal . . . . App. 8.

[33] The law officer's Article 133 charge to the court-martial is set out at A. 630-33. The specification is found at App. 8.

These too are strong, and, of course, vague words. The statements Dr. Levy was charged with making were to Army personnel. Thus, the "Army image" elements of the offense—"dishonor or disrepute" to the Army—remain unproved. Since the "offensive" statements were not made on a "soap box" but were within the Dermatology Clinic, they were heard only by Army personnel who, to adopt Government reasoning, knew the "Army image" at least as well as Dr. Levy. Since the prosecution offered no "repute" evidence (the only Record evidence regarding Dr. Levy's reputation is that it was excellent) and the law officer did not dismiss this charge, the court members were once again left free to set their own abstract standards of judgment. Again, such standard-setting in pure speech cases has never been permitted by this Court.

IV. THE REJECTION OF TRUTH AS A DEFENSE TO PURE SPEECH CHARGES ARISING FROM COMMENTS ON THE CONDUCT OF THE VIETNAM WAR AND WAR CRIMES RESULTED IN THE DEPRIVATION OF FIRST, FOURTH, FIFTH AND SIXTH AMENDMENT RIGHTS.

Dr. Levy, relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Garrison v. Louisiana*, 379 U.S. 64 (1964), interjected truth as a defense to the four pure speech charges.

Garrison, supra, 379 U.S. at 74, held:

> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.

Here one of the alleged statements was:

> Special Forces personnel are liars and thieves

and killers of peasants and murderers of women and children.

The law officer ruled:

> . . . A *subjectively held belief in the truth* of the various statements allegedly made by the accused in these charges, is no defense to a charge of publicly uttering words with a design to promote disloyalty and disaffection among the troops. [Emphasis added.] A. 464.

> Now, *the objective truth of the statements* allegedly made by the accused *is really not in issue* in this case. *Practically all of these statements are merely expressions of opinion;* expressions that become criminal only when attended with a design to promote disloyalty and disaffection among the troops, or under such circumstances that palpably prejudice good order and discipline in the Armed Forces. [Emphasis added.] A. 465.

> *The accused's statements as alleged, again, are basically expressions of opinion whose truth or falsity is hardly relevant.* The inquiry in this case is and must be not their truth or falsity, but were these statements uttered with a design to promote disloyalty, and did they have a reasonable and natural tendency to do so. [Emphasis added.] A. 466.

Even if a person is subject to criminal sanctions for his words, if what he said was objectively true, that truth cannot be considered "irrelevant." But, as the law officer said "as long as that Army won, I suppose" such true speech may be punished. A. 473. Thus, Dr. Levy was deprived of the truth defense. The problem became even more difficult for the law officer when Article 133 was considered.

> INDIVIDUAL COUNSEL: Could the question of truth go to the question of it being dishonorable?

> LAW OFFICER: I wonder about that. Both subjective and objective?
>
> INDIVIDUAL COUNSEL: Yes, sir. Could a man be dishonorable who speaks the truth? A. 474.

The prosecutor answered:

> [T]he law officer has already ruled for the purpose of this hearing, the commitment of the United States Forces in Vietnam is legal for the purpose of these proceedings. How can one say that the United States is wrong in Vietnam, if it has an objective reality apart of these proceedings? There can be no measure of truth or falsity to that that would have any relevance to this proceeding.
>
> LAW OFFICER: I don't see where truth is really an issue here. A. 475.

This ruling permitted a criminal conviction in direct conflict with *New York Times v. Sullivan* and *Garrison v. Louisiana, supra.*

When this Court has permitted "disloyalty" prosecutions, convictions have never been allowed on the mere utterance of true words. *E.g., Schenck v. United States,* 249 U.S. 47 (1919) (requiring clear and present danger); *Dennis v. United States,* 341 U.S. 494 (1951) (intent to incite forceful and violent action as speedily as circumstances permit); *Yates v. United States,* 354 U.S. 298, 329 (1957) (record "strikingly deficient" as to actual advocacy of anything but abstract doctrine). Thus even if the elements of the offense were proved, they were constitutionally deficient.

V. THE ORDER TO A MEDICAL OFFICER TO TRAIN SPECIAL FORCES AIDMEN WAS VIOLATIVE OF ACCEPTED STANDARDS OF MEDICAL ETHICS AND IN VIOLATION OF THE FIRST, THIRD, FOURTH, FIFTH, AND NINTH AMENDMENTS.

The defense of medical ethics was ruled admissible only in extenuation and mitigation and not as a defense to the lawfulness of the order. *Cf. Whelchel v. McDonald*, 340 U.S. 122 (1950). According to the *Manual for Courts Martial*, ¶169b (1951):

> The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. . . .
>
> A person cannot be convicted under this article if the order was illegal; but an order requiring the performance of *a military duty* is presumed to be lawful and is disobeyed at the peril of the subordinate.[34] Acts involved in the disobedience of an illegal order might under some circumstances be charged as insubordination under Article 134. [Emphasis added.]

The Oath of Hippocrates "represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day." *Roe v. Wade*, 410

[34] The burden of proof is thereby shifted to the defendant. It should be noted that the presumption here is not statutory. ". . . [I]ncriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit." Morissette v. United States, 342 U.S. 246, 275 (1952). *Compare*, United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965).

U.S. 113, 131 (1973). The Oath states:

> I swear . . . that, according in my ability and judgment, I will keep this . . . stipulation . . . that by precept, lecture and every other mode of instruction, I will impart a knowledge of the art to . . . disciples bound by a stipulation and oath, according to the law of medicine but to no others. . . . [W]hatever . . . I may see or hear in the lives of men which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret. A. 551.

Compare that Oath to the testimony of the Colonel who originated the Aidman program:

> . . . [I]n a struggle like this which is in many respects a social struggle that we have got to turn to the use of social instruments such as medicine. So in this way we sought to use medicine as a means of approaching the enemy and imposing our will on his. A. 559.

Q. Now you discussed the political use of medicine. That merges into a military use of medicine also, doesn't it?

A. Certainly. The military is after all only a political instrument. R. Vol. 7, p. 2154.

Dr. Victor W. Sidel, of the Harvard Medical School, testified that a physician's decisions on medical ethics must be made on medical, not political or military grounds. A. 579, 587.

Yet Dr. Levy was ordered to train combat troops—who, unlike medical corpsmen and others covered by the Geneva Convention, were "basically a soldier and an aidman as a secondary occupation," A. 506—to

serve as quasi-physicians without medical supervision in Vietnam.

In addition to an ethical responsibility to work to preserve human life and to teach medicine only to medical as opposed to combat personnel, Dr. Levy also had an ethical responsibility not to reveal the confidences of his patients.

The *Principles of Medical Ethics of the American Medical Association* states:

> A Doctor "should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care." He " . . . may not reveal the confidences entrusted to him . . . unless he is required to do so by law or unless it becomes necessary to protect the welfare of the individual or of the community." American Medical Association, Opinions and Reports of the Judicial Council VI-VII (1964).

The order to Dr. Levy required his Special Forces "students" to have some experience concerning " . . . Gonorrhea, Chancroid, Granuloma inguinale, Preparation of smears for bacteriological study, Gram staining method, and Identification of gram negative and gram positive organisms." R. Vol. 10, Pros. Exh. 2.

The order to Dr. Levy was issued in the face of a Technical Bulletin which provided that:

> Every patient diagnosed as having venereal disease will be interviewed . . . . Information on contacts is reported to appropriate medical investigative agencies . . . . *Information contained in these reports will not be disclosed to other than medical or health agencies without the patient's consent.* T. B. Med.

> 230, Treatment and Management of Venereal disease. 7 July 1965, Sec. I 3 d (2). [Emphasis added.]

And Army Regulation 40-554, ¶5, itself provided:

> The patient will be advised that the information derived from the venereal disease contact interview and entered on the venereal disease epidermilogic report will be used only by *health agencies* authorized to locate, examine and treat the named contact and otherwise will be held in strictest confidence. [Emphasis added.]

After Dr. Levy's refusal to allow Special Forces to view his patients, another physician disregarding all medical ethics concluded the training. Without her consent, a female dependent was used to educate Special Forces "students" as described below.

> Well, I had an appointment on January 17th at the dermatology clinic, and Captain Levy was not there. They had Dr. Allison in his place; and when I went in the room, I handed him my records, and all the special forces was in the room. He asked me where my trouble was. I told him below the waist, below my belt, and on my legs. He asked could I show him without going to the examination room. I did not make an answer whatsoever; I gave him a dirty look. So he sent for the sergeant to get a nurse. So when the nurse came, I went in to undress, and told her the story of what Dr. Allison had said to me. So then, thinking Dr. Allison would be the only one coming in to examine me—it was Dr. Allison, Dr. Caras, and eight or ten Special Forces men.
>
> . . . .
>
> Well, I was undressed. He pulled the sheet down, looked at it, showed those men the private part of my body, and said those dark spots were cold

> spots or nerves or some other name—some medical name I don't know. R. Vol. 6, p. 1098.

The law officer refused to instruct the court that if they found that Special Forces was not a medical or health agency and that Special Forces Aidmen would have learned the names of venereal disease contacts in the training program (a dead certainty) then the order was unlawful. R. Vol. 18, App. Exh. 24.

The sanctity of the doctor-patient relationship has constitutional protection. *Griswold v. Connecticut*, 381 U.S. 479 (1965). See *Doe v. Bolton*, 410 U.S. 179, 197 (1973). But the sanctity of Dr. Levy's patient relationships and medical ethics was ruled irrelevant.

Indeed, the privacy and conscience of all citizens are within the protection of the Constitution. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Gillette v. United States*, 401 U.S. 437 (1971); *Clay v. United States*, 403 U.S. 698 (1971). As was said in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), a first amendment religion case:

> [I]n this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas v. Collins*, 323 U.S. 516, 530 [1945].

And in *Thomas v. Collins, supra*, 323 U.S. at 531, Mr. Justice Rutledge said:

> The First Amendment gives freedom of mind the same security as freedom of conscience. [Citation of authority omitted.] Great secular causes, with small ones, are guarded . . . . [T]he rights of free speech and a free press are not confined to any field of human interest.

Here, where medical training violative of a physician's ethical concepts was sought, it was " . . . incumbent upon the [military] to demonstrate that no alternative forms . . . would combat such abuses without infringing First Amendment rights." *Sherbert v. Verner, supra*, 374 U.S. at 407.

An "alternative form" in the person of another physician who did not have Dr. Levy's ethical concerns might have been feasible. The record does not disclose that this means of avoiding an infringement of Dr. Levy's ethical precepts was attempted. Instead the Army simply ignored the precept, ordered and then court-martialed the physician, refusing to allow him the defense of medical ethics because its *Manual* did not allow for it.[35] *Compare: Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 164-65 (1944). Mr. Justice Clark, writing for the Court in *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoted with approval the language of Harlan Fiske Stone, later Chief Justice:

> [B]oth morals and sound policy require that the state should not violate the conscience of the individual . . . . [N]othing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which

[35] Although the ethics of the medical profession forbid medical officers and civilian physicians to disclose without authority information acquired when acting in a professional capacity, no privilege attaches to such information or to statements made to them by patients. MCM, Rules of Evidence, §151*c*(2) (1951).

See also *Military Justice Evidence*, DA PAM 27-172, p. 342 (June 1962); United States v. Shaw, 9 U.S.C.M.A. 267, 269, 26 C.M.R. 47 (1958) (the contention for the psychiatrist-patient privilege is "contrary to the Manual.")

> preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process. Stone, *The Conscientious Objector*, 21 COL. UNIV. Q. 253, 269 (1919).

See also Chief Justice Hughes, dissenting in *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (joined by Justices Brandeis, Holmes, and Stone).

The Government does not contend that Dr. Levy's ethical beliefs were "incorrect"; in light of the expert testimony (Dr. Jean Mayer, then of the Harvard Medical School faculty and more recently a Special Consultant to President Nixon and Chairman of the White House Conference on Food, Nutrition and Health, A. 566-77; and Dr. Victor W. Sidel, of the Harvard Medical School faculty, A. 577-91) that a decision not to train Special Forces Aidmen was consistent with and even demanded by medical ethics, the Government could not contend otherwise. The Government contends only that it does not recognize the defense.

Poe v. Ullman, 367 U.S. 497 (1961) involved the giving of medical advice, advice considered reprehensible by many persons on moral and religious grounds. Dr. Levy refused to impart advice and medical knowledge to Special Forces Aidmen on the same ground that Dr. Poe desired to impart birth control knowledge to his patients. Each felt professionally and ethically that as physicians their duty lay in their imparting or refusing to impart medical knowledge in accordance with standards of ethical medicine.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the statute attacked in *Poe* was declared unconstitutional. Even the dissent of Mr. Justice Black, 381 U.S. at

507-08, applies here for Dr. Levy was charged merely with the failure to do an act (and with the expressing of opinions, albeit on political subjects as well as medicine). There was no conduct. See also, Mr. Justice Stewart dissenting, 381 U.S. at 529, n. 3. Dr. Levy's ethical beliefs were entitled to protection from the state and recognition by the Army; he should not have been subjected to a criminal sanction.

VI. THE DEFENSE TO THE ORDER CHARGE THAT SPECIAL FORCES AIDMEN WERE COMMITTING WAR CRIMES WAS ERRONEOUSLY EXCLUDED BY THE LAW OFFICER.

The law officer soon was to make short shrift of the ethics defense. He had ruled truth irrelevant to the pure speech charges. Thereafter, truth became a defense *to the order charge*, the law officer saying:

> Now the courts, both military and civilian, have evolved a rule that there exists a presumption that the order of a superior is legal, and that the subordinate disobeys it at his own risk. In this case, the order to train special forces aidmen is legal on its face. Now the defense has intimated that the special forces aidmen are being used in Vietnam in a way contrary to medical ethics. My research on the subject discloses that perhaps the Nuremberg Trials and the various post war treaties of the United States, have evolved a rule that a soldier must disobey an order demanding that he commit war crimes, or genocide, or something to that nature. A. 465.

"Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children," App. 7, became, if true, a defense to the order charge. The ruling meant an Army officer must decline

to obey a "war crimes order" but he must risk defending against an Article 90 charge, bearing the burden of proof of illegality. But even if he is certain enough of the occurrence of war crimes to decline an order, he must not speak of these crimes, for truth is no defense for his speech.

The law officer expressed concern with Dr. Levy's phrase, A. 492-99, a phrase the truth of which seemed subject to judicial notice even in the mid-1960s for, excluding North Vietnamese troops, the struggle in Vietnam was against the Viet Cong, who were "peasants," "women," and "children." But the law officer said, ". . . I am almost ready to take judicial notice that they are not [engaged in war crimes]." A. 496.

So the defense sought to produce the "some evidence" of war crimes which under military law made submission of the defense to the court mandatory. An out-of-court hearing was held.

The Law of Land Warfare, Field Manual (FM) 27-10 (1956), defines war crimes as "a violation of the law of war by any person or persons, military or civilian." *Id.* ¶499. Thus, by use of the Army's own rules the proof was presented.[36]

[36] This manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the texts of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. *However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice. Id.* ¶1. [Emphasis added.]

The law of war is binding not only upon States as such but also upon individuals and, in particular, the members of their armed Forces. *Id.* ¶3*b*.

Compare the Government's reliance on the MCM and "custom and practice" to show General Articles' notice to bolster the pure speech charges.

Witnesses Robert L. "Robin" Moore, author of THE GREEN BERETS and a pro-war, pro-Special Forces observer in Vietnam, Captain Peter G. Bourne (then of the Walter Reed Army Institute of Research, now Assistant Director of the White House Office of Programs, Special Action Office for Drug Abuse Prevention), who had studied Special Forces A-Teams in Vietnam, and former Special Forces Sergeant Donald W. Duncan testified that they had actually been in a majority of the Special Forces A-Team encampments in South Vietnam and knew the patterns and practices there. See R. Vol. 5, pp. 959, 991-92, R. Vol. 6, p. 1021. Then the defense without contradiction proved violations of *The Law of Land Warfare*, ¶31 (forbidding assassination and bounty); *id.* ¶34*b* (use of weapons causing unnecessary injury); *id.* ¶¶56, 58, 393, 397, 448, 502 (outlining offenses against property and civilians and the mass transfer of civilians); *id.* ¶¶266, 433 (mistreatment of civilians); *id.* ¶¶270, 502 (impressment of local inhabitants); *id.* ¶¶85, 88, 89 (regarding treatment of prisoners); *id.* ¶504 (treatment of dead bodies —the collection of ears and payment of bounty thereon).[37] Additionally, the record is replete with references to the guerrilla and clandestine warfare activities—indeed, duties—of Special Forces Aidmen. See *e.g.*, Statement, *supra*, pp. 4-9.

"Complicity," *id.* ¶500, was demonstrated, see, *e.g.*, Greenspan, MODERN LAW OF LAND WARFARE, at 467-87 (1949) and cases cited therein. *Cf. In Re Yamashita*, 327 U.S. 1 (1946).

[37] The foregoing references include "texts of treaties to which the United States is a party."

Then the law officer ruled:

> . . . I know of no court, civilian or military, that is going to sit in judgment on the President's exercise of his power in disposing the troops of the United States. Disposition of troops under our constitution is peculiarily [*sic*] an executive power and not a judicial one. A. 466.
>
> While there have been perhaps instances of needless brutality in this struggle in Vietnam about which the accused may have learned either through conversations or through publications, my conclusion is that there is no evidence that would render this order to train aidmen illegal on the grounds that eventually these men would become engaged in war crimes or in some way prostitute their medical training [the testimony on the medical ethics defense came later] by employing it in crimes against humanity. A. 523.

The law officer did not rule that Special Forces were or were not, in fact, engaged in the commission of war crimes. He simply refused to allow the defense, which he had previously ruled valid, to go to the court.

The opportunity to demonstrate the illegality of the order was crucial. The law officer recognized this when he conducted an out-of-court hearing. He erred in applying the facts to the standard of proof.

Under military law the standard of proof required for *submission of an issue to the fact-finders* is "some evidence." See, *United States v. Evans*, 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967); *United States v. Moore*, 16 U.S.C.M.A. 375, 36 C.M.R. 531 (1966); and *United States v. Kuefler*, 14 U.S.C.M.A. 136, 33 C.M.R. 348

(1963). Dr. Levy's documentation of over 3,000 specific examples of war crimes [38] and the testimony of witnesses Robert L. Moore, Jr. (A. 508-17), Donald W. Duncan (R. Vol. 6, pp. 1011-26) and Captain Peter G. Bourne (A. 504 and R. Vol. 5, pp. 991-96) *clearly* and *surely* met the "some evidence" test.

It is now public knowledge and publicly acknowledged that war crimes were committed by United States troops in Vietnam. And the common question now asked is not "Were they committed?", but "Who, if anyone, shall be held responsible?" Dr. Levy accepted his responsibility. For that—and for talking about war crimes and civil rights—he was jailed. And, at his trial he was denied the opportunity to present the war crimes defense to the court. In this he was denied due process of law. And under *Whelchel v. McDonald*, 340 U.S. 122 (1950), the order charge conviction must be set aside.

The law officer knew of "no court, civilian or military," that would sit in judgment of war crimes. He well might have considered the words of Mr. Justice Murphy, dissenting in *Yamashita*.

> The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedures sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. *In Re Yamashita*, 327 U.S. 1, 28 (1946).

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[38] See R. Vol. 17, Appellate Exhibits 19A-19E, reproduced at A. 158 to A. 293.

Dr. Levy refused to provide advanced medical training to combat troops whose duty was to employ their knowledge as political and military weapons and to kill. He was by force of the Government an Army Captain, standing mid-way between the sergeant and general of Mr. Justice Murphy's dissent. He refused to be implicated in the use of medicine as a weapon and was jailed. That jailing was contrary to military law as well as the Constitution of the United States.

VII. THERE IS NO MILITARY NECESSITY NOR CONSTITUTIONAL JUSTIFICATION FOR NOT PROVIDING THE ACCUSED IN MILITARY TRIALS THE SAME RIGHT OF REVIEW OF CONSTITUTIONAL ERRORS AS IS AVAILABLE TO CIVILIANS.

If there was ever any justification for Article III courts to defer to military judgment in criminal cases, the justification has passed. It was always questionable.[39]

> While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969).

And as was said in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955), "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the *least possible power adequate to the end*

[39] Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 639 (1943).

proposed.' " [Emphasis in original.] [Quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-31, 5 L.Ed. 242 (1821).]

Historically this Court has deferred to military judgment. But an examination of this Court's "deference cases" shows clearly that the very basis for deference has passed, even apart from the development of the overbreadth doctrine.

Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1858), found that the Navy General Article suffered "apparent indeterminateness" but was "not liable to abuse" because the crimes and punishments were "well known by practical men in the navy and army." This conclusion was more fully expounded in *Smith v. Whitney*, 116 U.S. 167, 178-79 (1886):

> Of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. This is nowhere better stated than by Mr. Justice Perry in the Supreme Court of Bombay saying:
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> > . . . [T]he mutiny act and articles of war do not alone constitute the Military Code. . . . [The] procedure is founded upon the usages and customs of war, upon the regulations issued by the sovereign, and upon old practice in the army, as to all which points common-law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. (Quoting from *Porret's Case*, Perry, Orient Cas. 414, 419.)

United States v. Fletcher, 148 U.S. 84 (1893), added

nothing more to the law;[40] and no subsequent case bolsters the bare conclusion found in *Smith v. Whitney*. *See, Ex Parte Quirin*, 317 U.S. 1 (1942); *Carter v. McClaughry*, 183 U.S. 365 (1902); *Swaim v. United States*, 165 U.S. 553 (1897).

The Government argues that military personnel understand their criminal liabilities because they are in the military, and only they understand their customs. But, if Dr. Levy did not understand those customs, the Government argues that he should have referred to the *Manual* to resolve doubts. Brief for Appellants at 38. Thus Dr. Levy was to turn to some of the very writings upon the non-existence of which the ruling in *Smith v. Whitney, supra*, was premised. Regardless of whether an untrained physician "Berry-planned" into the status of officer and gentleman may be presumed to have read law prior to engaging in a conversation or the practice of ethical medicine, judges and lawyers are presumed to read law in the course of their work. Military "customs" are now reduced to writing and, from the *Manual*

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[40] The court of appeals below commented that the disposition of the challenge to the statute in *Fletcher* "can only be characterized as an incredibly conclusory manner . . . hardly ris[ing] to the stature of unshakable constitutional dogma." J.S.A. 28a.

Fletcher adds a vagary onto which the Government latches, in that the opinion affirmed a decision from the court of claims which commented:

> In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code. Fletcher v. United States, 26 Ct. Cl. 541, 563 (1891).

From this language the Government argues that if the military is compelled to write out its criminal code solely to avoid vagueness and overbreadth, its high code of honor will be lowered to that of a criminal code. Nothing compels the writing of codes at any particular level of behavior; the Government's argument is a *non sequitur*.

to reams of regulations to case reports of military courts to the written UCMJ, civil court judges can acquire military knowledge.[41]

Congress now requires that the members of the Court of Military Appeals be "appointed from civil life." 10 U.S.C. §867 (a) (1).[42] Additionally, any extension of trial by military authority is only "grudgingly conceded" in our system, *Reid v. Covert*, 354 U.S. 1, 23 (1957), for "[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955). Indeed, the thrust of learned commentary is to civilianization of the military law system. See *e.g.*, Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398 (1973).

Of overriding importance is the existence in our society of more than 30,000,000 veterans of military

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[41] There can no longer be a reason for not writing a criminal code to meet due process-notice requirements as the Constitution commands. Indeed, many who see difficulty in this seem to be saying that the writing of a code with due process-notice specificity is too difficult a task. If such a code is too difficult to write then "military law and customs" must be too difficult, while unwritten, for even lawyer, let alone non-lawyer, military personnel to understand.

[42] And, of course, review in some instances is had by the Secretary of the service branch involved and the President. 10 U.S.C. §867 (f).

The extent to which this concept of deference to military knowledge is illogical is illustrated by United States v. Sadinsky, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964). The ingenious Sadinsky found a mode of conduct not prohibited by any general order or regulation—he did a back flip off an aircraft carrier. The Navy Board of Review (military) dismissed for failure to state an offense under Article 134. The civilian Court of Military Appeals reversed these military men and upheld the conviction. Thus even where military men were unsure of whether Article 134 could reach particular conduct the civilian appellate court provided the answer.

service. It is hardly possible to draw a civilian jury on which all or many of the male members of the panel are not veterans. Indeed, on this Court there are four former commissioned officers, a former sergeant and a former private first class. Thus the reason for the rule of *Smith v. Whitney, supra*—in the Supreme Court of Bombay's phrase "common-law judges have no opportunity, either from their lawbooks or from the course of their experience, to inform themselves"—no longer exists.

The exemption of the American military from the commands of the American Constitution seems as out-of-step with modern day reality as the military's failure to seek statutes requiring that its personnel be fairly advised of the conduct expected of them under familiar rubrics already established by the decisions of this Court.

VIII. THE GENERAL ARTICLES ARE NOT SUPPORTABLE UNDER THE FIRST AND FIFTH AMENDMENTS. THERE IS NO MILITARY NEED OR NECESSITY JUSTIFYING INFRINGEMENT OF THE RIGHTS GUARANTEED THEREBY. THE RECORD HERE ILLUSTRATES THE CONSTITUTIONAL DEFECTS.

A. The General Articles Are Unconstitutional.

Article 133 reads:

> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

Article 134 reads:

> Though not specifically mentioned in this chap-

> ter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

On their faces, the General Articles not only fail to define crimes, they do not even purport to do so. They are but jurisdictional statutes.

There can be no supportable contention that these statutes are not vague. Article 134 has always been vague and intentionally so. *Reid v. Covert*, 354 U.S. 1, 38 (1957), characterized this Article as an example of "harsh law which is frequently cast in very sweeping and vague terms."[43]

THE LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL UNITED STATES (1951) contains an illuminating discussion of Article 134. In explaining "conduct of a nature to bring discredit upon the armed forces," this history of the 1951 *Manual* states "[t]his is the 'catch-all' in military law." *Id.*, p. 294. It explains that the Article was added to the code to provide the military with jurisdiction to try non-commissioned officers and soldiers who are re-

[43] And see John O'Brien (1st Lt., U.S. Army), A TREATISE ON AMERICAN MILITARY LAWS (1846). In speaking of the forerunner to Article 133, the author said, "The wording of this article is very vague. . . . We are forced then to go beyond the letter of the article to arrive at its true meaning." *Id.*, p. 158. The discussion went only to show that conduct must be unbecoming both as an "officer" *and* a "gentleman" to be an offense.

tired. (Article 133 already provided the Army jurisdiction to try retired officers.) *Id.*, p. 295. It is explained further:

> By judicial interpretation these "vague words" have since been expanded from the narrow construction placed on them by their author to the point where they have been used as the legal justification to sustain convictions for practically any offense committed by one in the military service which is not either specifically denounced by some other article, or is not a crime or offense not capital or a disorder or neglect to the prejudice of good order and discipline. *Id.*

Colonel William Winthrop's definition of Article 133 is cited to "flesh out" the offense.

> "Unbecoming," as here employed, is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety or not consonant with usage, but morally unbefitting and unworthy.
>
> "Gentleman." So, *this* term is believed to be used, not simply to designate a person of education, refinement and good breeding and manners, but to indicate such a gentleman as an officer of the army is expected to be,[14] *viz.* a man of honor; that is to say, a man of high sense of justice, of an elevated standard of morals and manners, and of a corresponding general deportment. Winthrop, MILITARY LAW AND PRECEDENTS, p. 711 (2d ed., reprinted 1920). [Emphasis in original; footnote omitted.]

And then, with a single footnote from this primary source of the Government's argument, Colonel Winthrop proceeds fundamentally to undermine the Government's case. For footnote 14 reads in part:

> It is said by DeHart, (p. 372) that—"the military

> community cannot expect, nor ought it to be expected of them, to preserve a higher tone of moral conduct than what is sustained by the higher orders of society." But they may fairly be expected to preserve one which is in no lower degree. See G.O. 41 of 1852, p. 5. *Id.*

Thus Winthrop did not contend for a "higher code termed honor." He did say if the military officer's conduct fell below that of the civilian population he could be held criminally liable (whereas a civilian could not).[44] Winthrop further defined the conduct constituting an offense under Article 133:

> Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents. Winthrop, pp. 711-12. [Footnotes omitted.]

The *Manual's* discussion of proscribed conduct has remained unchanged since 1886 (Winthrop's first edition). J.S.A. 34a, n.24. See ¶ 212 of the 1969 *Manual.* The law officer's instructions to the court substantially followed ¶ 212, the key words being:

> action or behavior in an official capacity which, in *dishonoring or disgracing the individual* as an offi-

[44] The Government misreads Winthrop or by omission leaves an incorrect impression. Winthrop points out that the 1775 version of the Article read "convicted . . . of behaving in a scandalous, infamous manner, such as is unbecoming," etc. The words of limitation, "scandalous, infamous manner," were deleted in 1806. Thus the effect was "to extend materially the scope of the Article, and thus indeed to establish a higher standard of character and conduct for officers of the Army." Winthrop, pp. 710-11. As the text quoted above makes clear, the standard for which an officer became culpable was raised (it no longer had to be scandalous or infamous), but not above the level of conduct of a civilian "gentleman."

> cer, seriously compromises his character as a gentleman. . . . [T]he act . . . *must have a double significance* and effect . . . , *it must offend so seriously* against justice, law, morality or decorum as to *expose to disgrace*, socially, or as a man, the actor. *Additionally*, the act must . . . *bring dishonor or disrepute upon the military profession* which he represents. *Further*, unbecoming . . . mean[s] not merely inappropriate or unsuitable, as being opposed to good taste or propriety, or not consonant with usage, *but morally unbefitting and unworthy*. A. 631. [Emphasis added.]

Dr. Levy, in his official capacity, must have so "dishonored" or "disgraced" himself that his own character was seriously compromised. But the witnesses had praise for his character. *E.g.*, R. Vol. 7, pp. 2342-51. The record is barren of evidence to the contrary.

Also, he must so seriously have offended "decorum" as to disgrace himself as a man. Here again, there is no proof. No offense against "law," "justice" or "morality" is alleged or raised by the proof.[45] Indecorum cannot be constitutionally prohibited. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1 (1949); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1967) (three-judge court), but it is the only one of the four words that the specification under this charge could conceivably refer to.

Additionally, he must have brought "dishonor or disrepute upon the military profession which he represents." The prosecution offered no evidence that the

[45] See Commercial Pictures Corp. v. Regents of University of New York, 346 U.S. 587 (1954), reversing, on the authority of Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), a finding that "immoral" conduct was properly regulated by administrative officials. When New York defined "immoral" it was held to violate the first amendment. Kingsley Int'l Pictures Corp. v. Regents of University of New York, 360 U.S. 684 (1959).

Army had suffered any loss of public esteem because of Dr. Levy's statements. Further, he must have offended not merely "good taste or propriety," but must have been "morally unbefitting and unworthy." The culpable terms—"decorum," "law," "justice," or "morality'—were used in the disjunctive. If any one term is constitutionally deficient, Dr. Levy's conviction cannot be sustained. *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Street v. New York*, 394 U.S. 576 (1969).

The court of appeals was clearly correct in declaring it could find no standards by which to judge conduct. The danger was compounded, it observed, when the application of such a statute was transposed to a military setting. J.S.A. 42a. It cited *Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972) for the following:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [Footnotes omitted.]

That, of course, is the danger here, along with denial of due process through lack of notice. And to what was the soldier to look in 1966 for an "authoritative interpretation" that Articles 133 or 134 would apply to Dr. Levy's speech? The Government points to no cases from the military courts. It cites to the 1969 *Manual*, ¶213*f*(5), and correctly notes as an example

> "utterances designed to promote disloyalty or disaffection among the troops, as praising the enemy" or "attacking the war aims of the United States...." Brief for Appellants at 38.

The *Manual* under which Dr. Levy was tried had one important word deleted from the 1969 *Manual:*

> Examples are *public* utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government. MCM ¶ 213*d* (5) (1951). [Emphasis added.]

The "public" aspect of the charge was deleted by the law officer who charged the court that it could delete the words "in public" if it found the statements arose not in public or keep them in if it found otherwise. A. 628. The court's finding was simply "Guilty." A. 644.

Three examples in an administrative guidebook do not constitute an "authoritative limiting construction," especially when even those examples were not followed in the prosecution. They add nothing to the definition of disloyalty or disaffection.

The ever-expanding number of offenses listed in the *Manual* for Article 134[*] underscores the arbitrary nature of the statute's use. As the court of appeals below concluded, "It becomes readily apparent . . . that at best the *Manual* includes but a compilation of those offenses previously determined by various courts-martial to come within the breadth of Article 134." J.S.A. 38a. A list of examples is a poor basis on which to judge what else shall be proscribed in the future. When the military courts decide a case, they deal with the specific situation before them and their discussion adds little by which to assess other conduct. Typical is the decision in *United States v. Frantz*, 2 U.S.C.M.A.

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[*] In 1967 there were "more than fifty different offenses ranging from abusing public animals to wearing an unauthorized insignia." J.S.A. 36a. See also, *id.* 38a, regarding the expansion.

161, 7 C.M.R. 37 (1953). The accused was convicted under Article 134 of "deceitful possession" of a false liberty card. The conviction was affirmed on the grounds that the possession "constituted a deliberate flaunting of the requirement that liberty cards be duly and properly authenticated" and of the authority "to issue such documents." *Id.* at 162-63. This decision, which is the landmark military authority for the proposition that Article 134 is not vague, sought to explain the military necessity which justified the decision.

> [T]he briefest of terminal references must be made to the presence of special and highly relevant considerations growing out of the essential disciplinary demands of the military service. These are at once so patent and so compelling as to dispense with the necessity for their enumeration—much less their argumentative development. *Id.* at 163-64.

No logical mind can contend that this language provides further notice to the serviceman by which to assess his "conduct" let alone his conversation.

Since the source of offenses under the General Article is administrative (listed in the Table of Maximum Punishments; appendix 6 of the *Manual*; done in "the discretion of minor executive or military officials," *Levy v. Corcoran, supra*, 389 F.2d at 932 n.2) (dissenting opinion), that alone is sufficient ground for affirming here. Our system rebels at the defining of criminal offenses by other than direct legislative action, and while criminal offenses have occasionally been defined in other manners, *e.g.*, tax regulations, administrative defining of criminal offenses should be sustained only when the most compelling reasons justify the delegation of this

power. The administrative defining here is an unconstitutional abridgement of the separation of powers.

> If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers. *Reid v. Covert*, 354 U.S. 1, 38-39 (1957).

The military recognizes this:

> [I]nclusion [in ¶ 213*d* and appendix 6c] of a specification for a particular act . . . is not what makes that act an offense. Offenses are denounced only by specific statute . . .—those which we are discussing, by Article 134—and there are necessarily many other acts which may constitute disorders or neglects, or conduct discreditable to the armed forces, which are not discussed or covered by any sample specification. LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL UNITED STATES 296 (1951).

> Nor is there any basis for the proposition that the President may create an offense under the Code. To the contrary, our forefathers reposed in the Congress alone the power "To make Rules for the Government and Regulation of the land and naval Forces." United States Constitution, Article 1, Section 8. *United States v. McCormick*, 12 U.S. C.M.A. 26, 28, 30 C.M.R. 26 (1960).

Since 10 U.S.C. §§ 836 and 856 direct the President to prescribe rules of procedure and evidence and maximum punishments, to the extent the *Manual* seeks to define crimes (or is utilized for this purpose) it is not

an unconstitutional delegation but a usurpation of power.

Rather than develop meaningful standards by which to judge conduct, the military courts have not deviated from (or improved upon) those codified by Winthrop's treatise.

Thus the Government is not able to offer delineating precedents. *Cf., Wainwright v. Stone,* ___ U.S. ___, 94 S.Ct. 190 (1973) (elements of offense spelled out by prior case law).

The offense of uttering disloyal statements is inherently difficult of definition because the aims or policies of government are often secret and when publicly known are often in flux. They may be misunderstood or, if understood, disagreed with. The charges here well illustrate the problem. One of the offending utterances alleged was:

> Are the North Vietnamese worse off than the South Vietnamese? I doubt it. Additional Charge II, App. 9.

How could fact-finders judge the culpability of such words, even if there were prior case law holding other words disloyal? The difficulty, of course, may not mean such words under some legal standards could never lead to conviction. It does mean that Dr. Levy had no standards by which to judge his speech. Dr. Levy's is the second reported military decision which dealt with disloyal statements. *United States v. Levy,* 39 C.M.R. 672 (ABR 1968).[47] The military courts here did not

[47] *See,* United States v. Batchelor, 19 C.M.R. 452 (ABR 1955) (the accused, a prisoner of war in Korea, wrote a letter to his hometown newspaper denouncing the alleged use of bacteriological

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define Dr. Levy's offense. They merely concluded he was covered. His case does not even approach *Bouie v. City of Columbia*, 378 U.S. 347 (1964), where a conviction was flawed by the state court's construction of a statute, which although proper, made the statute applicable to the accused but did not do so before the case arose.[48]

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warfare); there are subsequent cases which are of no help in defining disloyalty, *e.g.*, United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); United States v. Harvey, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970).

[48] At trial the overbreadth of the statutes, the charges, the specifications, and their vagueness led from one never beginning alley down an almost never ending street. For example, during the interrogation of a rabbi-chaplain, the following transpired:

> INDIVIDUAL COUNSEL: . . . [T]he nature of the charge is based on words and I am just trying to find out if there is a norm of speach [*sic*] around here. R. Vol. 6, p. 2040.
>
> LAW OFFICER: . . . But I am not particularly interested in any witness' idea of what is or is not disloyal. I will define that term to the court myself when I submit the case to them. That would be a mere personal opinion. I am sure both sides could present witnesses from many extremes to testify as to that.
>
> INDIVIDUAL COUNSEL: That is one of the points we are trying to make.
>
> LAW OFFICER: I will permit him to testify as to whether or not under the circumstances he thought the accused acted disloyal or whether his character is loyal or disloyal. I'll permit that as a character issue, but not as his ideas as to what is loyal or disloyal. That is hardly relevant.
>
> Q. With respect to his character, is he loyal?
>
> A. I believe he is.
>
> Q. Now, what do you base that belief on?
>
> PROSECUTION: Objection.
>
> LAW OFFICER: Sustained. You are going in the same area.
>
> INDIVIDUAL COUNSEL: I'm trying to go into an area—he has stated an ultimate conclusion. I want to find out the reason for his ultimate conclusion.
>
> LAW OFFICER: You can do that—I'm permitting him to testify as to a character trait, loyalty, not as to what this wit-

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The administrative materials and the lack of judicial precedent underscore the deficiency here. It is the stat-

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> ness might think an act may or may not be disloyal to the United States. *That is a very difficult abstract concept and if we are going to have testimony as to that we will be going through many, many hours of discussion and debate on that particular point.* A. 533. [Emphasis added.]
>
> LAW OFFICER: You are asking strictly for a conclusion of this witness under what circumstances may or may not be disloyal or not disloyal to the United States. *I don't think you have any expert who can testify as to that.*
>
> Q. May I ask you this question. You ever known of any enlisted man or any other officer or anyone else to your knowledge, that became disloyal because of Doctor Levy and his statements?
>
> A. No.
>
> Q. How about anyone who became disaffectionate?
>
> A. No. A. 534. [Emphasis added.]

At another stage of the trial, a physician-witness was on the stand. The following occurred:

> Q. He never made you disloyal, did he?
>
> A. No, sir.
>
> Q. He never made you disaffect, did he?
>
> A. What does disaffect mean?
>
> Q. I don't know.
>
> LAW OFFICER: Mr. Morgan, if you don't know the questions, don't ask them.
>
> . . . .
>
> INDIVIDUAL COUNSEL: Could I have a meaning from the court what disaffection is?
>
> LAW OFFICER: Should have asked it before you asked the question.
>
> INDIVIDUAL COUNSEL: I asked for a ruling on disloyalty the other day and you said you would supply it before the case went to the jury. I am trying to make out a case of proof on disloyalty and disaffection. I have difficulty understanding what the words mean.
>
> LAW OFFICER: Well, if you are going to ask the question you had better get the definitions before you go any further. R. Vol. 7, pp. 2183-84.

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ute (with elucidating judicial construction) not the "specification of details of the offense" after its com-

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Then after a continuing colloquy in which an out-of-court hearing was requested, the following occurred:

> INDIVIDUAL COUNSEL: I understand, Colonel. I am trying to get from you now, a ruling as to the legal definition of disaffection.
>
> LAW OFFICER: And I am going to tell you now that you don't need it at this time. *All you have to do is ask this witness what he means by the use of that word.*
>
> Q. What do you mean by the use of that word?
>
> A. I never used it.
>
> Q. Did you say you never —
>
> A. Never used the word. I'm sorry.
>
> Q. Fine.
>
> LAW OFFICER: Then you will have to rephrase your question to approach something what you mean by it. R. Vol. 7, p. 2184. [Emphasis added.]
>
> . . . .
>
> INDIVIDUAL COUNSEL: ". . . If I don't know the definition I don't know how to proceed.
>
> LAW OFFICER: Certainly, there is a legal definition of those terms, but we do not expect the witnesses to know these legal definitions or to speak only in legal terms. . . . They are to describe certain acts or feelings or ideas that they themselves have as a factual content of meaning and certainly . . . you could reach that through questioning . . . without going through a legal definition. R. Vol. 7, p. 2185.

Then the law officer himself asked:

> Q. Doctor, you were asked some questions which apparently Mr. Morgan found some confusion on. He used the word disaffection. I am going to ask you that in your conversations or contact with Doctor Levy, did he create in you feelings of hostility toward authority or a feeling that you should disobey or turn away from authority in the hospital there?
>
> A. No, sir. R. Vol. 7, p. 2187.

And he then held an out-of-court hearing in which he defined both "disloyalty," and "disaffection," using such words as "unfaithful," "disgust" or "discontent," "ill will" and with respect to "disaffection," the word "disloyalty." Other words used were

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mission which gives fair warning to the individual.

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"respect," "obedience," and "allegiance." He stated, ". . . in this case as a general rule, as a general idea, I will give you a definition because I am going to have both counsel supply me with definitions." And: "Now here again, that is just a broad general statement, and I may not define those terms for the court in those terms because *I am not satisfied with them myself.*" R. Vol. 7, p. 2191. [Emphasis added.]

Then:

> INDIVIDUAL COUNSEL: I don't mean . . .
>
> LAW OFFICER: I cannot tolerate in any courtroom a lawyer posing questions where he is confused by the words. *Id.* [Ellipsis in original.]

Thus, the following had occurred:

A rabbi had determined that Dr. Levy was "loyal," an "ultimate conclusion," "a very difficult abstract concept," but was not allowed to testify as to what he meant by "loyal." But then the rabbi was not allowed to testify as to "a conclusion . . . under what circumstances may or may not be disloyal . . ." but was allowed to testify that he knew of no one made "disloyal" or "disaffectionate" because of Dr. Levy and his statements. Thus, a rabbi did and yet somehow did not define Dr. Levy's crime.

A physician witness was asked, at the suggestion of the law officer himself, what he meant "by the use of that word." He, the witness, "never used it" so counsel for Dr. Levy was invited by the law officer to define it as something "you mean by it." Then the law officer, an Army Colonel, defined the words but was "not satisfied with" his own definition.

Later the question of whether the statements made "were disloyal" was left up to a court-martial of ten Army officers ranging in rank from Major to Colonel.

Thus, among others, a rabbi, a physician, ten court members, the law officer, the convening authority, a hospital commandant, a Staff Judge Advocate, prosecuting attorneys, and compilers of a G-2 Dossier all were allowed a word or so in defining Dr. Levy's alleged crimes. Even Dr. Levy's attorney was invited to participate.

Compare Carroll, ALICE'S ADVENTURES IN WONDERLAND, AND THROUGH THE LOOKING GLASS (Airmont Pub. Co. ed. 1965):

> "There's glory for you!"
>
> "I don't know what you mean by 'glory,' " Alice said.
>
> Humpty Dumpty smiled contemptuously. "Of course you

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Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

Another factor indicating the deficiency of the *Manual* is that it is open-ended in its Article 134 examples. J.S.A. 37a. It does not purport to list all offenses. *Cf. United States C. Serv. Comm'n v. National Ass'n of Let. Car.*, 413 U.S. 548 (1973). Its examples are ever expanding in number.[49] The court of appeals considered these "at best . . . a compilation of those offenses previously determined by various court-martials to come within the breadth of Article 134." J.S.A. 38a. Aside from the lack of a unifying theme of the specifications, the court of appeals believed that the *Manual* "runs on collision course" with *United States v. Reese*, 92 U.S. 214, 221 (1876), where it was said:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. *Quoted at* J.S.A. 39a.

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don't—till I tell you. I meant 'theres a nice knock-down argument for you!' "

"But 'glory' doesn't mean 'a nice knock-down argument,' " Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Alice was too much puzzled to say anything. . . . *Id.* at 198.

[49] The *Frantz* court found forty-seven in 1953; there were fifty-eight in 1967, Levy v. Corcoran, 389 F.2d 929, 933-34 (D.C. Cir. 1967); the 1968 *Manual* listed sixty-three, J.S.A. 38a; the 1969 *Manual* lists seventy-three.

The "collision course" terminology fails to describe the error here, for the *administrative* branch is the decider and the military courts fail to draw the line. Thus any act may be prosecutable if the circumstances are correct. The net has no bounds.

The court of appeals, which found the Articles constitutionally deficient in three respects—(a) denial of due process because of lack of warning to the accused; (b) encouragement of arbitrary and discriminatory enforcement; (c) infringement of first amendment rights—was clearly correct.

B. There is No Compelling Need to Permit Special Exceptions Based on the Military Justice Code.

The court of appeals considered three suggested possible justifications for the General Articles: (1) maintaining high standards of conduct; (2) ease of conviction; (3) justifying punishment for servicemen who commit unforseen crimes.[50] The court was not persuaded.

1. *Maintaining high standards of conduct.* Relying on *NAACP v. Button*, 371 U.S. 415, 438-39 (1963), it concluded that purposes of insuring high professional standards do not serve to rebut vagueness and overbreadth defects, and questioned

> what high standard of conduct is served by convicting an individual of conduct he did not reasonably perceive to be criminal? Is not the essence of high standards in the military, first, knowing one's duty, and secondly, executing it? J.S.A. 49a.

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[50] J.S.A. 48a, *citing* Note, *Taps for the Real Catch-22*, 81 YALE L. J. 1518, 1534 (1972).

The court suggested that delineation of standards under Article 134 would serve to support the high standards, not the opposite.

The justification of the General Articles on the ground that they help maintain "high standards" relies on the chilling effect of vaguely defined offenses. The intended result is for individuals to steer wide of the impermissible zone of conduct for fear of being caught in its net. The basic concept is abhorrent to our legal system. *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Also, as previously discussed, *supra* at 73-4, the "higher code" theory is a myth.[51] But even if not a myth, the Congress has not declared a need for a military "higher code termed honor." Yet the appellants improperly call for its sanction here to the detriment of military personnel.

2. *"Ease of conviction."* The court of appeals found this justification "totally bereft of explicit support," J.S.A. 49a, and the Government apparently abandons it in this Court.

3. *Justifying punishment for unforeseen crimes.* This justification fairly shrieks of its own invalidity. The claim seeks to justify *ex post facto* law. The court of

[51] The Government argues that officers command men whose mission is to fight wars and have responsibility to commit men to combat. It concludes that, "[b]ecause officers may carry great responsibilities, the military has historically required an especially high standard of conduct for them." Brief for Appellants at 28. Platitudes do not answer constitutional questions. Many persons make decisions affecting life and death—physicians often, but also airplane manufacturers, bridge construction workers, etc. This alone hardly justifies an infringement upon their constitutional rights. There is no evidence that any higher standard of conduct for officers was imposed because of their responsibility rather than the fact that officers were selected, in times past, from the upper class, whose members, naturally, were "gentlemen."

appeals noted that there is no federal common law of crimes and cited *Task Force on the Administration of Military Justice in the Armed Forces*, Vol. 1, p. 96 (1972) for the lack of need for Article 134, J.S.A. 50a. The lack of need is underscored by the existence of other punitive articles, Articles 77 through 132, UCMJ, 10 U.S.C. §§ 877-932, which spell out offenses with far more clarity. Also, Article 92 permits the military to prosecute violations of any "lawful general order or regulation." Thus by promulgating orders or regulations the military seems provided with a capacity for near immediate response in effecting criminal sanctions.

It is questionable, of course, as to how real the Government's stated concerns are.[52]

The Government's argument covers both sides of the coin: (a) the customs of the military are known to the military; (b) the instances in which an officer must make a decision "are too protean to be encapsulated in an exclusive listing." Brief for Appellants at 36. Indeed, the latter argument illustrates a misconception of what criminal statutes cover. Criminal statutes are not a list of all the possible ways in which one may commit, for example, assault and battery, but a criminal statute (as authoritatively construed) must define assault and battery. The fact that military duties are "protean" is exactly the difficulty. This justification completely negates the argument that military personnel know what their duties are simply because they are in the military.

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[52] "[T]he military is well known for its ability to promulgate detailed regulations on many subjects much less important than the First Amendment." Stolte v. Laird, 353 F. Supp. 1392, 1399, n. 26 (D.D.C. 1972).

The former Judge Advocate General of the Army, Major General Kenneth J. Hodson, now Chief Judge of the Army Court of Military Review, has expressed the view that Article 134 offenses could be delineated elsewhere and promulgated with specificity. "We would thus rid ourselves of 'the Devil's Article.' We don't really need it, and we can't defend our use of it in this modern world." Hodson, *Perspective: The Manual for Courts-Martial—1984*, 57 MILITARY LAW REV. 1, 12 (Summer, 1972).

C. The Utilization of the General Article Clearly Indicates That It Is Not Needed.

Mindful that first amendment incursions must be limited to the maximum extent possible, an examination of the "military necessity" for the General Articles reveals their overbroad utilization. An illuminating analysis of the use to which Article 134 is put is found in Moyer, JUSTICE AND THE MILITARY (Public Law Education Institute: Washington, D. C. 1972). The author found actual uses of the Article as follows:

A) Conduct punishable under another article of the UCMJ. When article 134 is used to try conduct punishable under another article, it may be for one of the following reasons:

1) fear that available proof may be insufficient and that prosecution under a specific article would result in a failure of proof;

2) to obtain a higher punishment than the permissible maximum for an offense under a specific article;

3) to duplicate a charge under a specific article: redundant pleading;

4) because of ease of charging under 134: lazy or sloppy pleadings.

B) Conduct not covered by another article of the UCMJ. When this is the case, the charge may reach two broad categories of conduct:

1) conduct that is proscribed in most criminal law systems but is not specifically codified under the UCMJ; *e.g.*, bribery, adultery, criminal libel, indecent assault, perjury, unlawful entry, carrying a concealed weapon, drug offenses, and others;

2) conduct that is not punishable under a specific article and does not customarily constitute criminal conduct; *e.g.*, sexual conduct, violations of traditional separation between officers and enlisted men, and other miscellaneous acts deemed reprehensible. *Id.* pp. 1018-19.

The Article is used to charge an offense when the evidence will not support a conviction for another specific offense. An element of the other offense may have been eliminated but a conviction is had because of the prejudice to good order and discipline.

By charging under Article 134 the punishment may be increased since the maximum punishments established for Article 134 by the executive under Article 56, UCMJ, 10 U.S.C. §856, may exceed those established by the executive for a specific statute.

Efforts to increase the numbers of offenses so that the charges are multiplicitous or redundant are easily facilitated by the General Article. Moreover, Article 134 may be used as a lesser included offense *under Article 133. United States v. Lee*, 4 C.M.R. 185 (ABR), *petition for review denied*, 4 C.M.R. 173 (1952).

Often a charge is lodged under Article 134 which clearly could have been charged under another punitive article of the UCMJ. Moyer considers this "lazy or sloppy pleading." Clearly this use, whether done through lack of professional performance or by simple choice, will hardly help in justifying the Article's existence. The Article's use to charge common criminal offenses (adding to them the easy gloss of "prejudicial to the good order") is an insufficient justification for its sweeping nature and chilling effect on constitutionally protected speech. The other uses here are even less needed, much less compelling—prosecution for "immoral" conduct (sexual conduct), enforcement of officer/enlisted man dichotomy, deterrence of possibly reprehensible acts not generally considered criminal (minors drinking in public places).

The Record here, if not a model of how to abuse the General Articles, is an excellent illustration. Additional Charges II (Article 133) and III (Article 134) were based on the writing of a single letter. Charge II (Article 134) and Additional Charge I (Article 133) were based on the same words, and are concededly multiplicitous. Lesser included offenses, based on manslaughter-type negligence, were charged under Charge II, and additional Charges II and III. A. 628, 634, 636.[55]

The prosecution conceded the letter charges were multiplicitous for punishment purposes. But they did place Dr. Levy's political views before the career officer court.

[55] The charge to the court-martial was "culpable disregard for the foreseeable consequences." The law officer equated this with "gross negligence." A. 638-39, 642. And when the court-martial found "culpable negligence" instead of "culpable disregard" or "gross negligence," A. 645, the last two charges were dismissed. A. 646.

IX. THE STATUTES SHOULD BE HELD VOID ON THEIR FACE TO PREVENT VIOLATION OF THE FIRST AND FIFTH AMENDMENTS. ADDITIONALLY, THE VOID FOR VAGUENESS DOCTRINE IS NECESSARILY APPLICABLE BECAUSE OF THE LIMITED REVIEW OF MILITARY PROSECUTIONS.

The Government contends that the General Articles should not be reviewed for facial invalidity, citing two lines of authority. The first is that under *United States v. National Dairy Corp.*, 372 U.S. 29 (1963), statutes may not be invalidated merely because "marginal offenses" present difficult questions. But *most* military prosecutions under the General Articles present difficult questions, because of the statute's extraordinary vagueness and overbreadth.

The second contention is that statutes are held facially void only where they regulate "spoken words" and not where they properly regulate a class of conduct. Reliance is placed on *United States C. Serv. Comm'n v. National Ass'n of Let. Car.*, 413 U.S. 548, 580-81 (1973), where this Court said it would not invalidate a statute on its face because the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . ." And in *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), where this Court said "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

The Government's reliance is misplaced.

First, it argues that the overbreadth here is not substantial since the *Manual* lists some seventy offenses

for Article 134, only five of which relate to speech. This "count" is not an appropriate measure of "substantial overbreadth." A statute which reads "all crimes against society shall be punished" may well encompass constitutionally proscribable offenses—but they are not easily discernible and the statute is both vague and overbroad.

Second, Dr. Levy was convicted of speech—not conduct.

Third, unlike *Letter Carriers*, the speech for which Dr. Levy was convicted is not plainly covered by the statutes involved.

Fourth, as contrasted with *Letter Carriers*, the General Articles have hardly been "fleshed out" by "repeated adjudications . . . subject to sufficiently clear and summary statement." 413 U.S. at 572. The military courts have seldom if ever held that any offense contained in a specification could not be covered by the Articles. The military appellate courts often hold an offense not proved or rule that certain conduct *is not* an offense *under the circumstances*—but they rarely hold that a particular act *could not* be punishable. The military's General Article criminal offenses are but an *ad hoc* collection, and almost any conceivable act, if done under the appropriate circumstances, can be prosecuted. *Compare, Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967), condemning intricate regulations which cause people to steer far wider of the unlawful zone than required. And here the law officer's charge on proscribed speech is a more than adequate example of why military personnel should fear speaking on any slightly controversial subject when the Army is not likely to agree with their views.

Fifth, the Government contends, as noted in *Broadrick*, that the courts may refuse to consider claims of facial overbreadth against a statute if it is not a "censorial statute, directed at particular groups or viewpoints," citing *Keyishian*. 413 U.S. at 616. But *Keyishian* was aimed at exactly the only kind of speech the Army prosecutes.

And Dr. Levy's case involves pure speech. *Cf. Plummer v. City of Columbus*, ___ U.S. ___, 94 S.Ct. 17 (1973); *Norwell v. City of Cincinnati*, ___ U.S. ___, 94 S.Ct. 187 (1973).

First and fifth amendment rights demand protection even for their periphery. *Keyishian v. Board of Regents, supra; Winters v. New York*, 333 U.S. 507 (1948). Dr. Levy presents an issue where not only is the statute vague as to the acts it seeks to proscribe, *Connolly v. General Construction Co.*, 269 U.S. 385 (1926), but it also regulates protected speech, *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Herndon v. Lowry*, 301 U.S. 242 (1937), and encourages arbitrary and erratic enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Gooding v. Wilson*, 405 U.S. 518, 528 (1972). Dr. Levy is challenging the statute squarely on its deficiencies, and does not rely on others' rights. *Cf. Eisenstadt v. Baird*, 405 U.S. 438 (1972); *NAACP v. Alabama*, 357 U.S. 449 (1958). While this Court does not lack the authority to construe federal statutes, *cf., United States v. Thirty-seven (37) Photographs*, 402 U.S. 363 (1971), "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution." *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965). Under both *Letter Carriers* and *Broad-*

rick, this case is appropriate for deciding the facial validity of the Articles.

A singularly important factor in deciding the "matter of no little difficulty"—whether or not a statute is to be held void on its face, *Coates v. City of Cincinnati*, 402 U.S. 611, 617 (1971)—is suggested by Amsterdam in *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960):

> These considerations [*e.g.*, buffer zone protection and judicial reluctance to determine the criminal law on a case-by-case basis] will suggest that the void-for-vagueness doctrine may be regarded less as a principle regulating the permissible relationship between written law and the potential offender than as a practical instrument mediating between, on the one hand, all of the organs of public coercion of a state and, on the other, the *institution* of federal protection of the individual's private interests. The doctrine determines, in effect, to what extent the administration of public order can assume a form which, first, makes possible the deprivation sub silentio of the rights of particular citizens and, second, makes virtually inefficacious the federal judicial machinery established for the vindication of those rights. [Emphasis in original.]

Thus whom the statute is to be applied by should be considered. This Court's review is more readily accessible, and constitutional infractions more easily prevented or corrected, when adjudications are not shielded by intermediate, non-federal appellate steps such as state habeas. Military adjudications are at least three more steps removed from this Court than ordinary state and federal cases since direct appeal may not be taken from the Court of Military Appeals.

Here, where censorial powers are applied by the military, judgments are made by courts-martial "singularly inept" in applying the Bill of Rights, and review of military convictions by Article III courts is exceedingly limited, the most efficient manner of protecting individual rights is by facial consideration of the Articles.

X. DR. LEVY'S PROSECUTION WAS SELECTIVE AND INVOLVED THE UNEQUAL APPLICATION OF MILITARY LAW. THE CONVICTION ON EACH CHARGE VIOLATED THE FIRST AND FIFTH AMENDMENTS.

The basis for Dr. Levy's conviction was disagreement with Army policy concerning the Vietnamese war. Since the right to disagree and say so is guaranteed by the first amendment, the exercise of that right cannot be a "rational basis" for a criminal prosecution. And the actions of the Army are doubly prohibited in that it is only a particular kind of speech, free and not Army speech, that is rendered criminal.[54]

Dr. Levy also tried to show the district court that he was treated unequally with other physicians at Fort Jackson.

He filed an affidavit in the district court, Exhibit C to Petition for Writ of Habeas Corpus, pp. 138-40, which indicated that another doctor at Fort Jackson who expressed no strong opposition to the war in Viet Nam requested that he not be sent Special Forces personnel for training because of medical ethics and belief the program was absurd. His request was granted and he was sent no more of them.

[54] *Cf.* Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508-510 (1969).

The difference between the two physicians is apparent. Dr. Levy exercised constitutionally guaranteed rights in the then mutually unpopular local causes of being pro-Negro and anti-war. His fellow physician had no interest in exercising these rights or adopting those positions and he remains free.

Doctor Levy discussed these questions in what he thought was the privacy of his office, as any professional or other person might do. But he did not "broadcast" as the Government contends. Brief for Appellants at 46. He talked because that is the nature of his freedom. He discussed medicine and medical ethics, R. Vol. 7, p. 2347, books he had read on civil rights and Vietnam, *id.*, p. 2348, theater, history, and democracy, *id.*, p. 2346. A Special Forces Aidman to whom the strongest statements were allegedly made, also signed the statement that

> Levy did not try to pressure me into changing my opinions. A. 729.

And in training Special Forces Aidmen, who have a higher G.T. score (similar to I.Q.) than Officers' Candidate School graduates, R. Vol. 6, pp. 2022-23, dissent is not discouraged. R. Vol. 6, p. 2133.

The Government protests too loudly the danger it seeks to suppress. "It is a disservice to our military personnel to presume that they would be so easily swayed . . . ." *Stolte v. Laird*, 353 F. Supp. 1392, 1404 (D. D.C. 1972). The fear that Dr. Levy's speech should be punished for its potential to create "within the military itself a cohesive force for the purpose of compelling political decisions" which would undermine "civil control of the military," *Dash v. Commanding General*, 307 F. Supp. 849, 856 (D. S.C. 1969), *aff'd*, 429 F.2d 427

(4th Cir. 1970) (cited in Brief for Appellants at 46) decries too much. The fear stated is that "the political decision to involve this nation in such war might be influenced, if not reversed." 307 F. Supp. at 856-57. But, as *Dash* said, the Government is not concerned with military speech that supports its current policies.

Its fear is really that its policy will be "influenced, if not reversed." Military speech in favor of a current policy or of more aggressive military action was not prosecuted. Our Commanders-in-Chief and Secretaries of Defense and State long stated that a peaceful negotiated settlement in Vietnam was preferrable to total military victory. But sundry generals disagreed.

Indeed the defense establishment is in the business of "educating" the public. Shoup, "The New American Militarism," *The Atlantic* (April 1969); Cook, THE WARFARE STATE, ch. 4, "Madison Avenue in Uniform," (1962); Mollenhoff, THE PENTAGON (1967). Roy I. Wood, Jr., Colonel, assigned to the 6th Marine Corps stationed at Atlanta, Georgia, testified as to the practice of sending officers and Vietnam veterans to speak to civilian groups. These personnel spoke in uniform, during and after duty hours. R. Vol. 6, p. 2114. They supported our troops, *id.* at 2115, and Colonel Wood had never heard of an instance of his speakers being against the war in Vietnam. *Id.* If he heard of such an instance he assumed that he "would take some action, but I don't know exactly what action." *Id.* at 2116. And it was "conceivable" that he would take less action against a speaker who might say, "I think we ought to bomb Peking, go on to China." *Id.* and *id.* at 2117. And the law officer said:

> Well, now, let's see if we can make this relevant here to these proceedings. Other people speak for

> the Army before service clubs and so on.
> R. Vol. 6, p. 2110.
>
> Well, I've talked, too, many times before, and they haven't court-martialed me. I wonder how we tie it into the specifics of the case?
> R. Vol. 6, p. 2111.

The fact that the Army prosecuted only those who expressed themselves at variance with the military's policy in Vietnam is precisely the point.[55]

The folly of attempts to compel uniformity of thought, aside from their unconstitutionality when sought by government, has been described by Mr. Justice Jackson for the Court, in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 641 (1943):

> Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. . . . Authority here is to be controlled by public opinion, not public opinion by authority.

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[55] See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886):

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court . . . .

XI. THE GOVERNMENTAL FAILURE TO PROVIDE DR. LEVY WITH THE TRAINING REQUIRED AND PROVIDED OTHER OFFICER-PHYSICIANS VOIDS HIS PROSECUTION. IT DENIED HIM THE OPPORTUNITY TO GAIN KNOWLEDGE OF THE CUSTOMS OF THE SERVICE.

The Government asserts that since "AR 350-212 (4) requires the officers under a training course in military justice which gives them a thorough exposure to the *Manual* [*sic*]." Brief for Appellants at 41-42. If this is an attempt to impute knowledge it fails by Record refutation.

The Army established a training course at Fort Sam Houston for physicians. But Dr. Levy spent his entire tour of duty at Fort Jackson.

> Col. Coppedge: The physician who comes into the service has no role—has had no prior military experience, and in the month or so training which he gets at Fort Sam Houston is designed to prepare him for military duty to give him some idea about the organization of the service, to teach him how to wear the uniform, and to perform the military courtesies in an acceptable manner, to be at ease in the service, and to really perhaps get some idea about what the Army is all about.
> R. Vol. 6, p. 2127.

Colonel Fancy had heard of some problem with Dr. Levy not joining the Officers' Club and that "*he found it difficult to comply with certain customs of the service,* such as proper wear of the uniform and trimming of hair and such general things." A. 384. [Emphasis added.]

According to LTC Edwin T. Cooke, Director of Neuropsychiatry, Medical Field Service School, Fort Sam Houston, Texas, the basic medical officer orientation

course "has been as brief as two weeks and as long as six weeks. The current course is four weeks and some days." R. Vol. 5, p. 913. The purpose of the course is "the orientation of the physician that comes into the military service, primarily to orient to the requirements for medical practice within the military service, within the military situation." R. Vol. 5, p. 915. Colonel Richard L. Coppedge, a former instructor at the Medical Field Service School, felt that doctors have special problems in being assimilated into the military.

> Furthermore, in their training, medical people physicians, are certainly taught to differ from their instructors or their superiors on any point. If you feel a patient should be treated one way and the professor feels he ought to be treated another way, it is your patient, and really he's got to justify to you in effect, with the treatment he thinks is better. Well, in other words, it's not so much that it appeals to authority on this, but an appeal to reason. This can't be entirely discarded like that just because you put on a uniform. . . .
> R. Vol. 9, p. 2625.

Thus,

> the officer that gets this training has been able to get into his duties, military duties, more effectively and more efficiently, earlier in his Army career. I think the person who doesn't get this training is at a disadvantage. R. Vol. 9, p. 2623.

And in September, 1965, Colonel Coppedge failed to make a trip to Fort Jackson to explain the training program to the physicians. R. Vol. 6, p. 2131. He finally made that trip in May, 1966. R. Vol. 6, p. 2145. He testified,

> Certainly it is important that [the Special Forces Aidman] gets this training, but the training itself

> cannot be fully effective unless the people who conduct the training understand what the training is expected to accomplish. . . . *Id.*

The Army's total failure to provide training to Dr. Levy—its *own* failure to abide by its *own* regulation, AR 350-212 (4), which requires a "thorough exposure to the *Manual*"—results in an argument by the Government which is totally inapplicable to the facts of the case. Except for a few Saturday morning training sessions Dr. Levy had no training which provided notice or knowledge of military law or customs. See Statement, *infra*, pp. 9-11.

XII. THE FAILURE TO DISCLOSE EVIDENCE DENIED DR. LEVY A FAIR TRIAL.

A. The Failure to Disclose the Entire G-2 Dossier to The Defense Was a Violation of the First, Fourth, Fifth and Sixth Amendments.

Colonel Henry Fancy ordered Dr. Levy to train Special Forces Aidmen. According to Colonel Fancy, Dr. Levy replied:

> he did not feel that he could ethically conduct this training because it was against his principles, or words to that effect at least. . . . A. 377.

Colonel Fancy decided that Dr. Levy's failure to instruct aidmen warranted an Article 15 non-judicial punishment.

Colonel Fancy was then called to the Judge Advocate General's office where he ". . . reviewed the G-2 dossier . . ." and ". . . felt that the wrongdoing was of a greater nature than should be punished by an Article 15

and it was my feeling at that time that a court-martial was indicated."[56] A. 396.

What magic did the dossier contain to transform these proceedings from the potential wrist-slap punishment of an Article 15 non-judicial proceeding to a full scale trial by court-martial, an eleven-year prison potential, discharge from the service, a wrecked professional career, and an actual sentence to three years at hard labor? *Neither the accused nor his counsel was allowed to find out.*[57]

The prosecutor reviewed the entire dossier, R. Vol. 3, p. 86, the law officer reviewed it *in camera* after, in effect, obtaining prosecutorial permission, *id.*, and assistant military defense counsel was allowed to review it. Everyone saw the dossier but the two men most in need of it—the defendant and his chief counsel.

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[56] Q: But, you didn't decide to move forward until you read the G-2 dossier again, right? On the Court-martial?

A: Yes, sir.

Q: Consequently the elevation of the Charge I from the Article 15 to Article 90 violation was based on reading the G-2 dossier wasn't it?

A: *In large part, yes, sir.* A. 397-98. [Emphasis added.]

[57] But there are some suggestions in Colonel Fancy's testimony:

Q: . . . According to testimony received here yesterday, which was made by Colonel Davis, and I quote exactly. You entered and you said that, "His records are flagged." And, then, your quote was, "Pinko." What do you mean by the word "Pinko."

A: This is a slang term that refers to someone who tends to follow communist beliefs, in an off-hand definition.

Q: Fine, so, you have knowledge of at least some facts at the time that you told Colonel Davis that Levy's file was flagged, "Pinko," right?

A: I had knowledge of something. A. 1085.

And: I obtained all my information on Captain Levy's possible previous political beliefs from reviewing a G-2 dossier and listening to questions from military intelligence agents. A. 423 (h).

Refusing to allow civilian counsel to examine the entire dossier, even though appointed military defense counsel (chosen not by the defendant but by the Government) viewed the dossier, denied Dr. Levy effective assistance of counsel. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Mooney v. Holohan*, 294 U.S. 103 (1935) and *Pyle v. State of Kansas*, 317 U.S. 213 (1942).

"[D]efense lawyers are not to be regarded as window dressing in the criminal process." *Molignaro v. Smith*, 408 F.2d 795, 799 (5th Cir. 1969). This is particularly true of a civilian lawyer who is chosen by a serviceman to act in his defense before a military tribunal.

Permitting the Army as prosecutor to appoint defense counsel—and then, as prosecutor, to reveal only to that military counsel the evidentiary documents upon which the charging officer, Colonel Fancy, testified that Dr. Levy's prosecution was based—reduces the role of civilian counsel. The argument at the court martial—that different lawyers look at different things different ways, that the two people who knew the most about the defense were Dr. Levy and his civilian counsel, and that some lawyers are more experienced than others—was to no avail.

There are two arguments supporting the Government's refusal: (1) security matters were involved and civilian counsel should not be allowed to see the dossier; and (2) the defense is not entitled to the Government's case. The first point is without merit. The dossier contains matters with a security status no higher than "confidential." Exh. C to the Petition for Writ of Habeas Corpus, p. 50. Dr. Levy's chief defense counsel could probably have secured a security clearance at the time of the court-martial and suggested that

solution. He was provided clearance to view the entirety of the transcript in a later case arising in Vietnam involving allegations of murder by a Special Forces officer, portions of which were classified "top secret." *Id.* at 121-22.

By permitting military defense counsel to examine the dossier, the Government waived any objection that the defense was not entitled to the Government's case. The Government's decision in this respect is extremely strange. It let one lawyer review the dossier and not the others. Since it did this for other than security reasons, the only likely reason is that it sought to protect the Record so that it could later make the argument that the defense had this information. But allowing the Government to select which counsel shall view the evidence is a concept new to criminal defense.[58]

Dr. Levy was entitled to the *adequate* assistance of civilian counsel, yet his chosen lawyer was not allowed to see most of the very dossier which was the basis of the charges and their upgrading. It having been alleged by the defense that the charges were based in part on Dr. Levy's pre-service activity, *cf. Harmon v. Brucker*, 355 U.S. 579 (1958), and his racial and political views, *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *Lenske v. United States*, 383 F.2d 20 (9th Cir. 1967), the refusal to permit civilian defense counsel to view the

[58] Even if the disclosure to the military defense counsel could be construed to give sufficient information to civilian counsel, the Record does not support this. Military defense counsel was not allowed to reveal what he had seen. He requested certain items but was told he could not get others so he did not request them. A. 351. The prosecution agreed that military defense counsel was bound by Army Regulations to non-disclosure. Military counsel "could not reveal it to [civilian defense counsel] anymore than he could go look at it himself." *Id.*

dossier violated Dr. Levy's first, fourth, fifth and sixth amendment rights.

The dossier may have contained illegally obtained matter. This should have been disclosed. *Alderman v. United States*, 394 U.S. 165 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 302 U.S. 379 (1937) and 308 U.S. 338 (1939). If it contained evidence favorable to the accused, concealment was improper whether done in good or bad faith. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967); *Griffin v. United States*, 336 U.S. 704 (1949), *on remand*, 183 F.2d 990 (D.C. Cir. 1950).

B. The Failure to Require the Disclosure of Questionnaires Prepared by the Government Deprived Dr. Levy of a Fair Hearing.

The Government submitted questionnaires to approximately 450 persons, the names coming ostensibly from Dr. Levy's patient records. Of these 450 persons, 13 were called as witnesses, and the questionnaires of these 13 were turned over to the defense. Since the Government contended that Dr. Levy made statements to "divers" persons with a "design" in a "public" manner, the defense asked for the balance of the questionnaires to show that the Army could not find more than 13 people who heard such statements, and possibly to disprove the testimony of the 13 called as witnesses. The contents of these other questionnaires were totally unknown to the defense.

The Army refusal was based on the Jencks Act, 18 U.S.C. §3500. That Act, however, requires only that the statements of witnesses be provided to the defense. Chief defense counsel for Dr. Levy specifically rejected

the Jencks Act as the grounds for production of the documents, relying instead on constitutional guarantees, complying with the mandate of *United States v. Augenblick*, 393 U.S. 348 (1969). Compliance with the Jencks Act does not rid the Government of its duty not to withhold information helpful to the accused. *Brady v. Maryland*, 373 U.S. 83 (1963); *Mooney v. Holohan*, 294 U.S. 103 (1935); and *Pyle v. State of Kansas*, 317 U.S. 213 (1942).

It is no defense of the Government's refusal to say that Dr. Levy had access to the same witnesses, since they had been his patients. Compelling the defendant to contact 437 persons at his own expense was patently unfair, since the Government was not going to use the questionnaires and the information would have aided the defense.

> The Government's facilities for discovering evidence are usually far superior to the defendant's. This imbalance is a weakness in our adversary system which increases the possibility of erroneous convictions. When the Government aggravates the imbalance by failing to reveal evidence which would be helpful to the defendant the constitution has been violated. *Levin v. Clark*, 408 F.2d 1209, 1211 (D.C. Cir. 1967).[59] [Footnote omitted.]

[59] The reasoning which supports the right of a defendant to counsel at all critical stages of a criminal proceeding, *cf.* United States v. Wade, 388 U.S. 218 (1967), also supports the right of access to helpful evidence discovered by the prosecution.

> When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. United States v. Wade, *supra*, 388 U.S. at 224. [Footnote omitted.]

Today, however, evidence is not largely marshalled at the trial, where it is available to all, but is assembled prior to the confrontation. To deny the defense access to helpful prosecution evidence violates the Constitution.

> When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. *Id.* at 1212, *citing Griffin v. United States*, 183 F.2d 990, 993 (D.C. Cir. 1950).

The district court refused to make the questionnaires available because it felt they could not negate the remarks made to the 13 prosecution witnesses.[60] But to constitute "evidence favorable to defendant," it has never been required that the evidence be clearly exonerating. It must only be favorable.

Withheld evidence violates due process. The court of appeals did not reach this issue but alone it is sufficient for reversal of the pure speech charges.

C. Appellee Was Entitled to the Disclosure of Information Obtained by Electronic Surveillance.

Dr. Levy moved under Rule 16 of the Federal Rules of Criminal Procedure for an order to permit counsel to inspect and copy all records, memoranda, and other writings, recordings or other electronic surveillance of Dr. Levy, his place of work or residence or any other place frequented by him.[61] App. 47. He believed that such surveillance was carried on, but the practical problems of establishing this are foreclosed if the Government fails to disclose the fruits of the surveillance.

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[60] The district court reasoned:

> If petitioner did not make certain statements to others than the 13 witnesses produced at the court-martial, this certainly would not negate the fact that he made the statements to the 13 witnesses, or that the utterances were "public" and made to "divers" persons. It is not "evidence favorable to defendant." 316 F. Supp. at 476, App. 20.

[61] No showing of relevance is necessary. Alderman v. United States, 394 U.S. 165 (1969).

The district court denied the motion on the Government counsel's representation that the Government obtained no information by eavesdropping. Counsel for Dr. Levy accepted this representation as given in good faith, but had reservations as to its accuracy due to the large number of people involved in the prosecution and the possibility that the sought information might not have come to the attention of this particular Government counsel. *Levy v. Parker*, 316 F. Supp. 473, 475 (M.D. Pa. 1970). J.S.A. 99a.

An order should be entered requiring a thorough search of the records of Defense Department, Fort Jackson, Military Intelligence and other appropriate military and civilian agencies including the Justice Department for evidence of any such surveillance. Additionally, all personnel who assisted in the prosecution or investigation of this case should be inquired of as to their knowledge, if any, of any such surveillance. And the involved agencies should be required to disclose their search efforts to this Court and to counsel for Dr. Levy.

XIII. THE ARTICLE 90 CHARGE SHOULD REMAIN REVERSED REGARDLESS OF THE DISPOSITION OF THE PURE SPEECH CHARGES.

The law officer refused to sever Charge I (the order charge) and the four pure speech charges, thereby depriving Dr. Levy of additional constitutional rights. See *e.g.*, *Pointer v. United States*, 151 U.S. 396, 403 (1894); *Williams v. United States*, 168 U.S. 382 (1897). There can be no doubt that the joinder of the four pure speech charges crippled the defense:

1. Dr. Levy was effectively deprived of the right to

testify on his own behalf; had he taken the stand and testified about either the order charge or the pure speech charges or the two letter charges, he tacitly would have admitted guilt by his silence as to the other charge or charges. See the "anomalous situation" condemned in *Stump v. Bennett*, 398 F.2d 111, 120-21 (8th Cir.), *cert. denied*, 393 U.S. 1001 (1968), and cases there cited. See also *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964).

2. Had he risked the stand as to all charges or the pure speech charges or letter charges alone, his testimony regarding purely political matters and matters of national policy might have so infuriated his career-military judges that his sentence would have escalated to the five year maximum on the order charge.

3. His refusal to train Special Forces Aidmen was not demonstrative of a scheme or design. To the rational mind exactly the opposite is the case. Had he desired to make Special Forces "disloyal" or "disaffectionate" he would have maintained at least a speaking acquaintance with them. As it was he refused to train them and thereby put them totally beyond the range of his voice. The reason for joinder clearly and solely was to prejudice the career-officer court.

4. By joinder he was forced to a "grisly 'Hobson's Choice,'" and testified not at all. *Cf. Whitus v. Balkcom*, 333 F.2d 496, 499 (5th Cir. 1964); *Stump v. Bennett*, *supra*.

5. There were other possible defenses to the order charge. For example, Dr. Levy might have pleaded that obedience to the order was impossible either due to the unwillingness of his patients to serve as observed

guinea pigs or the inability of the students to absorb the knowledge or their unwillingness to abide by his rules. And, most importantly, without the political content of the pure speech charges before them, the career-officer jury might have disbelieved the order charge evidence or, if they believed that evidence, sentenced him with leniency.

The Government argues that the joinder was not prejudicial. First, says the Brief for Appellants at 48,

> in military courts offenses must normally be joined which do not have the same or similar character.

And why "must" they be so joined—because the *Manual*, ¶¶ 30*g*, 33*h* (1969) says so. *Id.* See also MCM, ¶33*h* (1951). According to the Brief for Appellants at 51, separate trials on offenses arising out of separate transactions "is not the procedure Congress authorized, and there is no reason to impose such a requirement on the court-martial system." *See*, J.S.A. 16. As pointed out in the Motion to Dismiss or Affirm, p. 25, n. 29, Congress did not authorize this procedure—the President promulgated it. This procedure, in direct contradition of Rule 8 (a), Federal Rules of Criminal Procedure, ignores 10 U.S.C. §836, which requires the President to prescribe

> [t]he procedure, including modes of proof . . . which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Severance here would not have been in any way inconsistent with the UCMJ and the Government made no claim that separate trials to accord with the federal

rule would not have been practicable. Instead, it argues "it is not done."

The four pure speech charges—no matter the desire of the court to remain impartial—must have offended and shocked at least some career-officer court members. Dr. Levy stood against their chosen profession, their way of life, and perhaps for some—their past actions.

The general rule concerning consolidation of charges was established in *Pointer v. United States*, 151 U.S. 396, 403 (1894), where it was recognized as fundamental . . . that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment and to be tried by one jury. . . . [Joinder of felonies is not automatically fatal but the] court is invested with such discretion as enables it to do justice between the government and the accused.

Even where a statute controls joinder of related offenses, the power of the Court to rule on the propriety of joinder continues. *Williams v. United States*, 168 U.S. 382 (1897).

The four pure speech charges and the order charge did not involve the same witnesses or issues, a common plan or related offenses. Indeed no witness involved in the proof of Additional Charges II and III was in the remotest manner related to the proof of Charge II and Additional Charge I, let alone Charge I, the order charge. The prejudicial effect of the evidence offered under Additional Charges II and III—charges involving an eight-page letter in which Dr. Levy's political philosophy was bared to the career-officer Court members—is incalculable.

The Government has never contended that the letter charges were necessary.

> LAW OFFICER: Additional II and Additional III the Government concedes are multiplicious for punishment purposes at any rate?
>
> PROSECUTION: Yes, sir.
>
> LAW OFFICER: Fine.
> R. Vol. 3, p. 117.

But when the court delivered its verdict on these two charges the prosecution moved their dismissal and the maximum punishment dropped in some mysterious fashion from eleven to eight years. A. 646. The letter charges had served as the genesis for the prosecutor's closing argument. R. Vol. 9, p. 2554. They had served to prejudice the career-officer court and were dropped when wrung dry of usefulness.

As previously noted, joining the order charge to the pure speech charges permitted the Government to prove basically inconsistent factual situations. The law officer stated plainly that "the evidence tending to show the disobedience of the order" was that Special Forces personnel were told by Dr. Levy "I'm not going to train you and the person went on his way. . . . There was no additional presentation to that individual of the statements concerning our involvement in Viet Nam as I understand it." A. 480. Yet the speech charge evidence was that the statements were made to "divers personnel" which included Special Forces and "everybody to whom the statements were made." *Id.* Allowing the Government to prove two conflicting fact theories—a refusal to train and be exposed to Special Forces personnel versus the desire to "subvert" them—to prove separate crimes in one trial was error. *Williams v. United*

States, supra; Pointer v. United States, supra. The Government correctly notes that the "substantially prejudiced" test dissenting Judge Seitz applied was formulated by him and contends that this departure from the law was justified because the differences between military and civilian trials render existing civilian court authorities irrelevant. Brief for Appellants at 49.

The court of appeals majority noted that the inflammatory evidence most calculated to disturb the court-martial members was introduced under the Articles 133 and 134 charges, and most of this "would have been inadmissible under the Article 90 charge . . . ." J.S.A., 54a. Thus they found "with some facility that Levy was prejudiced by the admission of evidence on the Articles 133 and 134 charges; in any event, there undoubtedly existed a reasonable possibility that he was prejudiced." *Id.* at 56a. They declined to speculate on the course of the trial if only the order charge had been tried.

Despite the test created by Judge Seitz,[61] the majority applied the correct test. This Court no longer searches the record for actual prejudice. Rather, it looks first to see if the practice complained of is inherently prejudicial, and if so, the inquiry goes no further. In *Estes v. Texas*, 381 U.S. 532, 543 (1965), Mr. Justice

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[61] See, Wright, FEDERAL PRACTICE AND PROCEDURE: Criminal Vol. 1, §141, p. 306, commenting on joinder:

> It is novel doctrine that the right of an accused to a fair trial can be balanced against competing considerations of efficiency. . . . It seems strange indeed that one presumably innocent may be made to undergo something less than a fair trial, or that he may be prejudiced in his defense if the prejudice is not "substantial," merely to serve the convenience of the prosecution.

Clark expressly said that the Court had rejected the actual prejudice test:

> In [*Rideau v. Louisiana*, 373 U.S. 723 (1963) and *Turner v. Louisiana*, 379 U.S. 466 (1965)], the Court departed from the approach it charted in *Stroble v. California*, 343 U.S. 181 (1952), and in *Irvin v. Dowd*, 366 U.S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it.

Regardless of speculation as to the outcome of a separate trial on the order charge, there is one certainty —Dr. Levy's eight-page letter would not have been placed before the career-officer court nor would its contents have been relied upon. Actual evidence of how Dr. Levy's political or racial views affected at least one career officer is available. For Colonel Fancy had thought the order charge merited Article 15 "dereliction of duty"—non-judicial punishment—treatment until he read of Dr. Levy's views and whatever else was contained in the G-2 Dossier.

He upgraded to a general court-martial. Whether because of bias or confusion, *Kotteakos v. United States*, 328 U.S. 750, 767 (1946); *Williams v. United States*, 131 F.2d 21, 23 (D.C. Cir. 1942) ("[W]hat value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?"), Dr. Levy was prejudiced in his defense to the order charge.

Not only is there a "substantial possibility that [the] error may have infected the verdict," *Wardius v. Oregon*, 412 U.S. 470, 479 (1973), but "there is present in

this record abundant evidence of actual prejudice." *Dickey v. Florida*, 398 U.S. 30, 38 (1970). Consequently, the reversal of the order charge conviction was correct *regardless of whether or not the pure speech charges convictions were proper.*

XIV. THE MILITARY FORUM IN WHICH DR. LEVY WAS TRIED WAS CONSTITUTIONALLY DEFECTIVE.

A. The following groups were excluded from Dr. Levy's court-martial panel:

(1) Non-career personnel.[62]

(2) Enlisted men.[62]

(3) Officers equal to or lower in rank than Dr. Levy.[62]

(4) Medical personnel.[63]

(5) Women.[64]

Timely motions were made to quash the court-martial panel on the grounds of exclusion of each of these groups, which motions were denied. R. Vol. 3, pp. 36-38, 208.

While this Court has assumed in dicta that the sixth amendment right to trial by jury does not apply in the

[62] Article 25 (d) (1), UCMJ provides: "When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade."

[63] AR 40-1, ¶ 9-B provides in part: "Except when regulations specifically stipulate to the contrary, such officers [members of the medical corps] will not be detailed as members of courts-martial. . . ."

[64] There were no women summoned for service on Dr. Levy's court-martial. He offered to prove in addition that during the preceding fifteen years no woman had ever been a member of a general court-martial at Fort Jackson. R. Vol. 3, pp. 138-45, 208, 213-14.

military, *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex Parte Quirin*, 317 U.S. 1 (1942); *O'Callahan v. Parker*, 395 U.S. 258 (1969), it has consistently held military courts to minimum constitutional standards. *Burns v. Wilson*, 346 U.S. 137, 142 (1953):

> The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from violation of his constitutional rights.

Since *Strauder v. West Virginia*, 100 U.S. 303 (1880), the sixth amendment "impartial jury" requirement has applied to trials in most American courts. The prosecution conceded as much, R. Vol. 3, p. 165, and decisions of the Court of Military Appeals so provide.

> Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the facts. Methods of selection which are designed to produce a court membership which has, or necessarily results in, the appearance of a "packed" court are subject to challenge. *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3, 6 (1964).

But the effect of Article 25 (d) (1) was to exclude from consideration for service on Dr. Levy's court enlisted men, non-career personnel and officers equal to or lower than he in rank. As for exclusion of women, Dr. Levy clearly established a prima facie case and it was error for the law officer to deny summarily the motion to quash. *Whitus v. Georgia*, 385 U.S. 545 (1967); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court); *Healy v. Edwards*, 363 F. Supp. 1110 (E.D. La. 1973) (three-judge court) (regarding exclusion of women from jury duty), *appeal docketed sub nom. Edwards v. Healy*, 42 L. W. 3307 (No. 73-759, Nov. 12, 1973).

The prejudice to Dr. Levy in an arbitrary and exclusive "jury" selection procedure was compounded by command influence and the absolute discretion of the convening authority to appoint the "best qualified" men to the panel.[65] Discretionary standards for juror selection may be facially constitutional, *Turner v. Fouche*, 396 U.S. 346 (1970), but this Court has consistently held that such discretion may not be exercised to insure non-representational juries. *United States v. Mississippi*, 380 U.S. 128 (1965); *Avery v. Georgia*, 345 U.S. 559 (1953); *Williams v. Georgia*, 349 U.S. 375 (1955). Dr. Levy's "jury" consisted of ten career officers, nine from the infantry and one from the artillery. They ranged in rank from major to colonel. Their average age was 41 years and, including time spent in military colleges, their average length of service was 19.3 years.[66] Four had served in Vietnam, one of them losing an eye there in a "friendly mine field."

Dr. Levy was faced by a "venire" selected by the General who ordered him court-martialed. His G-2 dossier was in the possession of one of the General's Colonels. His Article 32 Investigation had been conducted by one of the General's Lieutenant Colonels. The military defense and prosecuting attorneys had been selected by the senior partner in the General's law firm—the Staff Judge Advocate. The General's "corporate counsel" had other members of the "firm" draw up the charges; he reviewed the proceedings and gave his client post-trial recommendations regarding

[65] Article 25 (d) (2), UCMJ provides: "When convening a court-martial the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. . . ."

[66] Exh. C, to the Petition for Habeas Corpus, p. 122.

the trial and sentence. Then the General had the right to reverse the conviction or reduce the sentence.[67]

The problem of "command influence" has plagued the system of military justice both before and after the passage of the Uniform Code of Military Justice. *See Reid v. Covert*, 354 U.S. 1, 36 (1957); Note, *Judicial Checks on Command Influence Under the Uniform Code of Military Justice*, 63 YALE L. J. 880 (1954). Command influence in selection of court-martial members was regarded by the principal author of the UCMJ, Professor Edmund M. Morgan, as pervasive, the protections inadequate, and the problem nearly insurmountable short of civilian control. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 179, 183-84 (1953).

Any trial advocate would trade most procedural right in the Bill of Rights for the right to choose the jury. In the military, it is the commander who chooses the jury, and who controls courts-martial through the explicit or implicit use of disciplinary powers and the power to build or destroy military careers through efficiency reports.

The members of a court-martial panel must personally feel that professional, social, and economic consequences to them may hinge on their decision. They know that the General would not have convened them in the first place unless he felt that the accused had done some-

[67] "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist*, No. 47 (Hamilton, ed. 1880, quoting James Madison), as quoted in United States v. Brown, 381 U.S. 437, 443 (1965).

thing wrong;[68] thus a finding of guilt cannot hurt, and probably will help, their careers.[69]

B. The unfairness of discriminatory "jury" selection procedures in the military is enhanced because:

1. The "jury" may convict by a two-thirds vote.[70]
2. Each side has only one peremptory challenge.[71]
3. Challenges for cause are heard and voted on by the challenged officer's fellow court members.[72]

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[68] "The convening authority may not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under this chapter and is *warranted by evidence. . . .*" Art. 34(a), UCMJ [Emphasis added.]

[69] This influence is certainly more pervasive than the mere "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial . . ." that will, on due process grounds, necessitate a change of venue. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

[70] The death penalty may only be imposed by a unanimous vote of the court-martial. Conviction for all non-capital offenses may be had upon "the concurrence of two-thirds of the members present at the time the vote is taken." Art. 52 (a)(2), UCMJ. This Court held in Apodaca v. Oregon, 406 U.S. 404 (1972) that majority verdicts in state criminal cases are not unconstitutional. But unanimity is required in federal criminal cases. Andres v. United States, 333 U.S. 740, 748 (1948); Patton v. United States, 281 U.S. 276 (1930). However, even *Apodaca* presupposes that non-unanimous juries represent a cross section of the community and are untouched by command influence. It thus has no precedential value here.

> As we said in Williams [v. Florida, 399 U.S. 78 (1970)], a jury will come to such a [fair] judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. 406 U.S. at 410-11.

[71] Art. 41, UCMJ provides:

> (b) Each accused and the trial counsel is entitled to one peremptory challenge, but the law officer may not be challenged except for cause.

[72] At the time of Dr. Levy's court-martial Art. 41, UCMJ pro-

(footnote continued on next page)

While he objected to the Article 41 procedures, rather than risk antagonizing his self-qualifying court-martial, Dr. Levy made no challenges. R. Vol. 3, pp. 42-43. His non-exercise of the one peremptory challenge allowed him to keep the number of votes of court members required for conviction at seven. Had he exercised his permitted challenge to one of the ten court members only six conviction votes (two-thirds of nine) would have been necessary. His was the "'grisly' Hobson's choice" of *Whitus v. Balkcom*, 333 F.2d 496, 499 (5th Cir. 1964).

C. The Article 32 investigation procedure in this case was unconstitutional since the investigating officer, appointed by the convening authority, was subject to the same pervasive effect of command influence as the members of the court-martial.[73] Dr. Levy was to that extent deprived of procedural fairness at a critical stage

(footnote continued from preceding page)
vided:

> (a) Members of a general or special court-martial and the law officer of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarly be presented and decided before those by the accused are offered.

Article 41 was amended on October 24, 1968, so that now the "military judge, or, if none, the court, shall determine the relevancy and validity of challenges for cause. . . ."

[73] Appellee's objections are noted at R. Vol. 3, pp. 44, 46-7. Article 32 provides:

> (a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

of the proceedings against him.[74] *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963).

In addition, the exclusion of the press from the Article 32 investigation over Dr. Levy's objection violated first, fifth and sixth amendment guarantees. R. Vol. 3, p. 47, and A. 360. Our nation has an "historic distrust of secret proceedings, [with] their inherent dangers to freedom. . . ." *In re Oliver*, 333 U.S. 257, 273 (1948). The public trial guarantee with "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.* at 270.[75] While the Court of Military Appeals has held that there is no requirement that Article 32 investigations be open to the public, *MacDonald v. Hodson*, 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970), where an accused has waived any interest he may have in a private hearing, requests that the proceedings be public, and where no legitimate governmental interest in preventing disclosure of classified information is present, no justification for holding the Article 32 investigation in private exists.

D. The prosecutor played a preferred role in Dr. Levy's prosecution. He served as a sort of clerk, bailiff, district attorney, sheriff, *amicus*, custodian, and special

[74] The Article 32 investigation both operates "as a discovery proceeding for the accused and stands as a bulwark against baseless charges." United States v. Samuels, 10 U.S.C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959).

[75] Other benefits noted were that (1) publicity may move witnesses unknown to the parties to come forward, and (2) spectators may learn about their government and acquire confidence in judicial remedies. *Cf.* the 437 potential witness questionnaires concealed from the defense.

investigator, as he does in all courts-martial. The prosecutor administers oaths (he even swears in the law officer, now military judge) and issues subpoenas (his own and those of the defense, unless he decides he doesn't want to issue the defense subpoenas, in which case he requires the defense to tell the General who convened the court-martial in the first place why they are relevant).[76]

He sends notices to the court, takes muster when the court convenes, announces the appointing order, and generally, serves as the man upon whom the court-martial can safely rely. He identifies witnesses, swears them in and has them point the accusing (identifying) finger at the defendant.[77]

Courts have implemented the right to a fair trial by purging the courtroom of inequality between prosecution and defense. Insofar as possible distinctions between rich and poor are abolished. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). A defendant may not be denied the presumption of innocence by being tried in prison clothes, *Hernandez v. Beto*, 443 F.2d 634 (5th Cir. 1971), nor forced to prove his own innocence. *Cool v. United States*, 409 U.S. 100 (1972). The Government is not to enter a case with an initial advantage, and it is presumed that only competent evidence of guilt will suffice for conviction. In Dr. Levy's case, however, the prosecutor was entrusted with special duties which enhanced his status in the eyes of the court. His purely adversary functions acquired an increment of authority and to that extent facilitated conviction. Where the

[76] See MCM, ¶ 115*a* (1969).

[77] Dr. Levy's objections to the preferred "insider" role of the prosecutor were overruled. R. Vol. 3, pp. 38-40, 51-56; R. Vol. 7, p. 2248.

fairness of justice is involved, in fact as well as appearance, a showing of actual prejudice is not required. *Avery v. Georgia*, 345 U.S. 559 (1953).

E. The Staff Judge Advocate's role insured unfairness. The Staff Judge Advocate, the General's lawyer, appoints both the prosecution and defense counsel, helps draft charges, advises the General, no doubt helps select court members, and at the conclusion of the trial makes recommendations to the General.[78]

Here he and his deputies performed above, beyond, and contrary to the UCMJ's [79] call to duty. His presence permeates the Record, *See*, e.g., R. Vol. 2, report of 1 March 1967 Exh. 2, p. 22; *id.* Exh. 3, p. 2; *id.* Vol. 13, App. Exh. 7, pp. 310-11, 387, 711; R. Volumes 13-15, 19, *passim*, and to use the language of *Pickering v. Board of Education*, 391 U.S. 563, 578-79, n.2 (1968) was an "obvious defect . . . in the fact-finding process."

F. The atmosphere at Fort Jackson required that Dr. Levy's request for a change of venue be granted. R. Vol. 7, pp. 2242-47. Major Parsons, who had lost the sight of one eye in a mine field in Vietnam, was threatened on the night before the deliberations began. R. Vol. 9, pp. 2632-33. A physician witness attempted to take the fifth amendment because he feared the "military law"; he feared the Army's power to send him to Vietnam if he testified adversely to Army interests. R. Vol. 6, pp. 2090, 2094, 2100-01. Another defense witness, a Fort Jackson physician, felt the mood and knew the pressure, R. Vol. 7, pp. 2181-82, and had, in

[78] Dr. Levy's objections to the multiple roles played by the Staff Judge Advocate were overruled. R. Vol. 3, pp. 46-47.

[79] See, *e.g.*, the disqualifications of Article 6 (c), particularly as to an investigating officer thereafter acting as Staff Judge Advocate.

fact, been threatened by an enlisted man who thought he was Dr. Levy. *Id.* Finally, the public information officer circulated a brochure discrediting a defense witness. R. Vol. 7, pp. 2246-48. In *Groppi v. Wisconsin*, 400 U.S. 505, 514 (1971), this Court held that changes of venue may be commanded upon proper showing even in misdemeanor cases: "unfairness anywhere, in small cases as well as in large, is abhorred, is to be ferreted out, and is to be eliminated." (Mr. Justice Blackmun, joined by Chief Justice Burger, concurring.)

There was a climate of prejudice at Fort Jackson. Under constitutional standards for changing venue, Dr. Levy was entitled to be tried elsewhere. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Marshall v. United States*, 360 U.S. 310 (1959). *Cf. ABA Standards Relating to Fair Trial and Free Press* §§2.1, 3.2(c) (1968).

Tried by a jury from which women, enlisted men, non-career personnel and those equal to or lower in rank than he had been excluded and which was self-qualifying and needed only a two-thirds majority to convict; where command influence was the dominating fact of life; where the prosecutor played a special insider's role as did the Staff Judge Advocate; and tried on an Army post where witnesses feared to testify, Dr. Levy was court-martialed in a manner which failed to meet minimum constitutional standards. This Court could affirm on that basis alone. *Swarb v. Lennox*, 405 U.S. 191 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

CONCLUSION

For the foregoing reasons, appellee urges that the Court should dismiss the appeal for failure to file a legally sufficient notice of appeal, or in the alternative, that the judgment appealed from be affirmed.

Respectfully submitted,

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